Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1977

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NO. 77-5903

McARTHUR CORBITT,

Appellant,

-v-

STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

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# JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO._____

MCARTHUR CORBITT,

Appellant,

-v-

STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

## JURISDICTIONAL STATEMENT

Appellant, McArthur Corbitt, appeals from the judgment of the Supreme Court of New Jersey entered on October 6, 1977 which affirmed his conviction for first-degree murder and the mandatory life sentence imposed thereon. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are present.

## OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, entered on September 23, 1975 is unpublished. A copy of that opinion is attached hereto as Appendix A.

The opinion of the Supreme Court of New Jersey is reported at 74 N.J. 379, 378 A.2d 235 (1977). A copy of that opinion is included as Appendix C.

JURISDICTION

Appellant Corbitt was convicted of felony murder in the Superior Court of New Jersey, Law Division, Essex County and was sentenced to life imprisonment. At his sentencing and on appeal, appellant contended that this mandatory life sentence imposed upon a conviction for first degree murder unconstitutionally penalized his Fifth and Sixth Amendment right to a jury trial, since a defendant who pled to the offense could receive a sentence for a term of years. This contention was held to be without merit by the Appellate Division of the Superior Court, which affirmed appellant's conviction.

Subsequently, the Supreme Court of New Jersey granted certification "limited to the question of the validity of the mandatory life sentence for murder." A copy of that order is attached as Appendix B. Before the Supreme Court of New Jersey, appellant contended not only that the murder statute penalized his right to a jury trial, but also that the sentencing scheme violated the Equal Protection Clause. However, that Court held the murder statute to be constitutional and thus affirmed appellant's conviction. 74 N.J. 379, 378 A. 2d 235 (1977). A Notice of Appeal was filed with the Supreme Court of New Jersey on November 30, 1977. A copy of that notice is included as Appendix D.



Jurisdiction to review the decision of the Supreme Court of New Jersey is conferred by Title 28, United States Code, § 1257(2). Cohen v. California, 403 U.S. 15, 18 (1971).

QUESTIONS PRESENTED

1. Whether the New Jersey murder statute, which imposes a mandatory life sentence on defendants convicted of felony murder after a jury trial, but which allows defendants who do not contest their guilt to be sentenced to a term of years, served to penalize the exercise of the appellant's Fifth and Sixth Amendment rights to a jury trial.

2. Whether, consistent with the Equal Protection Clause, a state may enact a statute which provides separate scales of punishment for those persons who plead to an offense as opposed to those persons who are convicted after a jury trial.

STATUTES INVOLVED

This appeal involves New Jersey Statutes Annotated 2A:113-1,2,3, and 4, which are set forth at length in Appendix E.

STATEMENT

Appellant was convicted of arson and murder in the Superior Court of New Jersey, Law Division, Essex County. All of the evidence pointed to a felony murder. Allegedly, after having a series of disagreements with his landlord

concerning rent payments, appellant set fire to his apartment building to gain revenge. In the course of that fire, a visitor to a second floor apartment died of smoke inhalation.

At the sentencing on May 16, 1973, defense counsel noted that if appellant had pleaded to the murder charge he would have been eligible to be sentenced to a term of not more than thirty years in prison. However, because he had been convicted of this offense after a jury trial, appellant was subject to the mandatory life sentence imposed for first degree or felony murder. Thus counsel argued that the murder statute was unconstitutional and that the judge should exercise the same powers that he would have had in the event that appellant had chosen not to contest the charges. However, the Court ruled that he was powerless to impose any sentence except life imprisonment.

In an opinion dated September 23, 1975, the Appellate Division of the Superior Court of New Jersey rejected appellant's contention that the penalty provision of the murder statute was unconstitutional and affirmed his conviction. However, because the case clearly involved a felony murder, the Appellate Division merged the arson conviction into the murder charge.

Appellant then petitioned the Supreme Court of New Jersey to review his case. In an order dated February 18, 1976 the Court agreed to hear the case but limited its review to "the question of the validity of the mandatory life sentence upon a jury conviction for murder."



On October 6, 1977 the New Jersey Supreme Court held by a five to two majority that the statute was constitutional. Specifically, the majority held that: (1) the holding of United States v. Jackson did not extend to cases where there was no threat of the death penalty; (2) even if Jackson was applicable, the New Jersey murder statute did not "needlessly" encourage guilty pleas; and (3) the statute did not violate the Equal Protection Clause because there was a rational basis for imposing separate penalty schedules. The two dissenting justices, in separate opinions, both found the mandatory life sentence to be needless and coercive.

## THE QUESTIONS ARE SUBSTANTIAL

### A. The Fifth And Sixth Amendment Rights To A Jury Trial

In United States v. Jackson, 390 U.S. 570, 581 (1970), this Court struck down the death penalty provisions of the federal kidnapping statute because it needlessly encouraged guilty pleas, while penalizing those defendants who exercised their Fifth and Sixth Amendment rights to a jury trial. The appellant would submit that the New Jersey murder statute, as its predecessor which was struck down in Funicello v. New Jersey, 403 U.S. 948 (1971), is clearly unconstitutional because it imposes a penalty upon those defendants who insist upon a jury trial.

Under the former penalty provisions of the statute, a defendant who was convicted of first-degree murder after a jury trial would receive the death penalty unless the jury recommended otherwise, while the defendant who pled

to the offense could receive no more than life imprisonment. However, in Funicello v. New Jersey, supra, this Court, in a memorandum opinion, held that statutory scheme unconstitutional on the basis of United States v. Jackson and other cases. Thereafter, in State v. Funicello, 60 N.J. 60, 286 A2d 55 (1972), cert. den. sub. nom. New Jersey v. Presha, 408 U.S. 942 (1972), the Supreme Court of New Jersey acted to preserve the remainder of the statute by excising the death penalty provision.

Thus, at the present time the penalty for first-degree murder is life imprisonment, while the punishment for second degree murder is not more than 30 years in the State Prison. N.J.S.A. 2A:113-4. However, in New Jersey an accused is not indicted for either first or second degree murder, but rather for the crime of "murder," which encompasses both degrees. State v. Williams, 39 N.J. 471, 479, 189 A2d 193, 197 (1963). Not until the jury renders its verdict does it designate the crime as being either first or second degree murder. N.J.S.A. 2A:113-2. Felony murder and premeditated murder are both considered murder in the first degree. N.J.S.A. 2A:113-2. Thus a defendant who goes to trial in a felony murder case and is convicted must receive the mandatory sentence of life imprisonment. N.J.S.A. 2A:113-4, State v. Corbitt, 74 N.J. 379, 378 A2d 235 (1977).

However, a defendant accused of felony murder may avoid this mandatory life sentence if he is willing to



plead to the offense. N.J.S.A. 2A:113-3 provides in pertinent part:

> In no case shall the plea of guilty be received upon any indictment for murder...
>
> Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea shall be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

In sentencing a defendant who has pled non vult to the crime of murder, a judge is not to make a determination as to the degree of the crime, but rather he has complete discretion to impose a term of not more than 30 years, the punishment for second degree murder, or life imprisonment, the penalty for first degree murder. State v. Walker, 33 N.J. 580, 588, 166 A.2d 184, 185-86 (1957). Thus it is common for a defendant entering a non vult plea to set forth facts which would clearly indicate a first degree murder, but yet be sentenced to a term of years. See e.g. State v. Hubbard, 123 N.J. Super. 345, 351-52, 303 A.2d 87, 90 (App. Div. 1973), certif. den. 63 N.J. 325, 315 A.2d 413 (1973). On the other hand, if that defendant refuses to enter a plea but goes forward to trial and is convicted on the same facts, then he must receive a life sentence. Therefore, even though the maximum sentence for murder is life imprisonment whether or not there had been a trial, the statute nevertheless penalizes the defendant who goes to trial by requiring that after conviction he must be sentenced by a judge who has no discretion to impose a sentence of less than life imprisonment. This statutorily-

imposed loss of discretion in the sentencing judge, which may mean the difference between a few years in the State Prison and life imprisonment, is a severe penalty for a defendant to pay simply because he has chosen to exercise his constitutional rights.

The fact that the death penalty is no longer involved does not make such a sentencing scheme proper. Although the severity of the death penalty may require special concern for the rights of the condemned, Furman v. Georgia, 408 U.S. 238, 286-87 (1972), (opinion of Douglas, J.), the appellant does not understand the Jackson decision to extend only to death penalty cases. Rather, United States v. Jackson is merely one of a long line of cases in which this Court has held that neither courts nor legislatures may impose premiums on the exercise of constitutional rights. Griffin v. California, 380 U.S. 609 (1965); Garrity v. New Jersey, 385 U.S. 511 (1967); Dunn v. Blumstein, 405 U.S. 330 (1972). Indeed, there have been numerous cases not involving the death penalty in which the courts have recognized that a defendant may not be penalized merely because he insisted upon his right to trial. See e.g. United States v. McCoy, 429 F.2d 739, 743 (D.C. Cir. 1970); United States v. Derrick, 519 U.S. 1 (6 Cir. 1975); Hess v. United States, 496 F.2d 936, 938 (8 Cir. 1974); United States v. Stockwell, 472 F.2d 1186 (9 Cir. 1973); People v. Young, 20 Ill App. 3d 891, 314 N.E.2d 280 (1974). Similarly, in Blackledge v. Perry, 417 U.S. 21, 25 n.4 (1974), this Court held that where a state enacts statutes which open avenues of access to the courts, it is a violation of the Due Process Clause for the state to then vindictively punish those defendants who exercise their rights under the statute. See also North Carolina v. Pearce, 395 U.S. 711, 724 (1969).



Although in Ludwig v. Massachusetts, 427 U.S. 618 (1976), this Court did allow a "two tier" system by which a defendant accused of certain crimes could receive a more severe sentence after a trial de novo, the majority opinion written by Mr. Justice Blackmun was careful to distinguish Jackson by pointing out that under the Massachsetts system "the same range of penalties is available at both tiers." Id. at 627, n.4. In another recent decision, Middendorf v. Henry, 425 U.S. 25 (1976), this Court noted that, while it is permissible under the Uniform Code of Military Justice for a person to be subject to more severe penalties because he has requested counsel and a formal court martial, in a civilian context this same scheme would call into play the reasoning of United States v. Jackson that one cannot be penalized for exercising a constitutional right. Id. at 48, n.25. Thus it is clear that the basic rationale of the Jackson decision extends well beyond those cases in which there is a possibility of the death penalty.

The question that remains is whether there is a need for this type of statute or whether it is an unnecessary burden on the exercise of the appellant's constitutional rights. In its opinion below the Supreme Court of New Jersey found a need for the murder statute in that it encouraged guilty pleas and thus provided substantial benefits for both the State and the defendant. State v. Corbitt, supra, 74 N.J. at 396, 378 A.2d at 244. Among the benefits to the defendant is the opportunity to receive a lesser sentence, while the State may obtain a quick determination of guilt without going through the time and expense of a jury trial. 74 N.J. at 394, 378 A.2d at 242. Yet, while encouragement

of guilty pleas may be a valid government objective, discouragement of jury trials is not.

In United States v. Jackson the Government had contended that the sentencing provision of the kidnapping statute was justified because it served to mitigate the severity of the death penalty. 390 U.S. at 582. However, as this Court noted:

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights... The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.
>
> * * *
>
> The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial. Id. [citations omitted]

Thus, since there was no need for the death penalty provision in the Federal Kidnapping Act, it was struck from the remainder of the statute. It should be noted that in State v. Forcella, 52 N.J. 263, 280, 245 A.2d 181, 190 (1968) the Supreme Court of New Jersey had relied upon this mitigation of punishment argument in an attempt to save its death penalty provision, but that statute was nevertheless struck down in Funicello v. New Jersey, supra. In the present case the fact that the New Jersey murder statute may encourage guilty pleas and save judicial resources can no more justify the statute than did the mitigation of punishment argument. Regardless of its objectives, the



fact remains that the sentencing scheme of N.J.S.A. 2A: 113-1 to 4 is unnecessary and therefore a burden on the right to a jury trial. There is simply no need to give a convicted defendant the maximum sentence solely because he has chosen to go to trial.

Admittedly, the criminal justice system is replete with the making of difficult judgments and the Constitution is not violated merely because a defendant has to choose between two alternatives. Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973); McGautha v. California, 402 U.S. 183, 203 (1971); McMann v. Richardson, 397 U.S. 759, 769 (1968). Moreover, there is a degree of inherent coercion present in the decision whether to stand trial because it is common for leniency to be extended to persons who plead guilty. Brady v. United States, 397 U.S. 742, 761 (1970). But normally a defendant who goes to trial pays no penalty for exercising his rights since, if convicted, he still may receive any sentence allowed by the statute. However, under the New Jersey murder statute, a defendant who stands trial in a felony murder case knows that, if convicted, he must receive the maximum penalty, life imprisonment. This is not the sort of coercion inherent in the criminal justice system; it is a vindictive penalty imposed only on those who have exercised their constitutional rights. The effect of this statute is equivalent to the pronouncements of a judge who indicates that he will impose the maximum punishment on any defendant convicted before him at a jury trial. United States v. McCoy, supra, 429 F.2d at 742-43. Accordingly, the appellant would submit that the New Jersey

murder statute, N.J.S.A. 2A:113-1 to 4, places an unnecessary burden on the right to a jury trial and is therefore in violation of the Fifth and Sixth Amendments.

B. The Equal Protection Clause

As noted, the New Jersey murder statute has two scales of punishment for the same offense. If a defendant pleads non vult and admits a felony murder, he may be sentenced to not more than 30 years in prison or to life imprisonment. But if that person is convicted of felony murder after a trial, he receives the mandatory sentence of life imprisonment.* It is submitted that this scheme of different punishments for the same offense, based solely on whether the defendant has gone to trial, violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause does not prevent a state from classifying persons into separate groups, it merely requires that such classifications be reasonably related to a permissible state purpose. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 17 (1973); McGinnis v. Royster, 410 U.S. 263, 270 (1973); Dandridge v. Williams,

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* The State had argued below that there was a difference between a conviction for "murder" and a conviction for felony murder. 74 N.J. at 400, 378 A.2d at 246. The Supreme Court of New Jersey did not find this to be "a fully satisfactory basis for meeting the defendant's argument," and thus chose to address the question more directly. 74 N.J. at 401, 378 A.2d at 246. In any event, this distinction would not matter in the present case. Although N.J.S.A. 2A:113-2 requires a jury returning a guilty verdict to "designate by their verdict whether it be murder in the first degree or in the second degree," State v. Greely, 11 N.J. 485, 489-91, 95 A.2d 1, 3-4 (1953), the jury in the present case simply found appellant guilty of "murder." Of course, since the case was tried on a felony murder basis, the conviction was deemed to be one of first-degree murder.



397 U.S. 471, 487 (1970). In the present case the Supreme Court of New Jersey held that the murder statute did not violate the Equal Protection Clause because it was rationally related to legitimate state goals such as "ameliorating the rigor of life imprisonment for those... willing to acknowledge their crime" and "the facilitation of plea negotiations in homicide cases." 74 N.J. at 402, 378 A.2d at 246-247. But the "rational relationship" test is inappropriate in cases such as the present involving infringements on fundamental rights. Rather, where the nature of the challenged classification serves to impose a penalty on the exercise of a constitutional right, the Equal Protection Clause demands that there be a "compelling state interest" to justify that classification. Memorial Hospital v. Maricopa County, 415 U.S. 250, 256-58 (1974); Dunn v. Blumstein, supra, 405 U.S. at 337-39; Shapiro v. Thompson, 394 U.S. 618, 634 (1969). This "compelling interest" test is applicable even where a classification has not been shown to deter the exercise of the constitutional right, but merely serves to penalize it. Dunn v. Blumstein, supra, 405 U.S. at 339-40; Shapiro v. Thompson, supra, 394 U.S. at 634. Moreover, even if the state does have a compelling interest, it still must demonstrate that it has used the least restrictive alternative to achieve its goal. Dunn v. Blumstein, supra, 405 U.S. at 342-43.

In addition to the Fifth and Sixth Amendment right to a jury trial, the appellant would submit that the right of access to the courts is also a fundamental right requiring the invocation of the "compelling state interest" standard. See Nadeau v. Helgemore, 423 F. Supp. 1250, 1265 (D.N.H. 1976). In Pruett v. Texas, 468 F.2d 51 (5 Cir. 1972), aff'd en banc 470 F.2d 1182 (5 Cir. 1973), aff'd mem. sub nom.

Texas v. Pruett, 414 U.S. 802 (1973), a defendant challenged a Texas statute which operated to deny "good time" credit for those prisoners who had chosen to appeal their convictions. The Fifth Circuit held, and this Court agreed, that the Equal Protection Clause did not allow the State of Texas to impose such a premium upon a defendant's right to appeal. 486 F.2d at 56. Since that state had provided a process by which defendants could appeal their convictions, it was required to keep that process free of "unreasoned distinction" which could only impede open and equal access to the courts." Id. See also North Carolina v. Pearce, supra at 724; Griffin v. Illinois, 351 U.S. 12, 18 (1956). Because the denial of good time credits served to penalize a prisoner's right to appeal, the statute was held to be in violation of the Fourteenth Amendment. See also Robinson v. Beto, 426 F.2d 797 (5 Cir. 1970).

Certainly, none of the reasons advanced to justify the New Jersey murder statute would qualify as a "compelling state interest." While it is commendable that the statute serves to "ameliorat[e] the rigor of life imprisonment for those offenders who are willing to acknowledge their crime." 74 N.J. at 402, 378 A.2d at 246, the State has no compelling interest in not extending the same sentencing alternatives to persons convicted at trial. Although the statute may serve to facilitate plea negotiations in murder cases by discouraging trials, such a disparate sentencing scheme is not necessary to preserve plea bargaining. Rather, despite the fact that the murder statute is the only New Jersey law which provides separate scales of punishment for



defendants convicted at trial, plea bargaining is an accepted and widespread practice in the state. See e.g. State v. Thomas, 61 N.J. 314, 321, 294 A.2d 61 (1972). The fact that elimination of jury trials conserves scarce judicial resources is irrelevant, since expense has never been recognized as a justification for limiting constitutional protections. Griffin v. Illinois, supra, 351 U.S. at 17-19. Thus, there being no compelling state interest, the discriminatory classification of those defendants who have exercised their right to a jury trial violates the Equal Protection Clause.

CONCLUSION

It is submitted that the Supreme Court of New Jersey erred in sustaining the validity of the state murder statute because that law clearly penalizes the right to a jury trial in violation of the Fifth, Sixth, and Fourteenth Amendments. The appellant would further submit that the questions presented by this appeal are not only substantial but are of great public importance warranting plenary consideration by this Court.

Respectfully submitted,

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3457-72

STATE OF NEW JERSEY,

Plaintiff-Respondent,

-v-

McARTHUR CORBITT,

Defendant-Appellant.

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Argued September 8, 1975 - - Decided SEP 23 1975

Before Judges Carton, Crahay and Handler.

On appeal from Essex County Court.

Mr. Carl Gottschall, designated counsel, argued the cause for appellant (Mr. Stanley C. Van Ness, Public Defender, attorney).

Mrs. Sara A. Friedman, Assistant Prosecutor, argued the cause for respondent (Mr. Joseph P. Lordi, Essex County Prosecutor, attorney).

PER CURIAM

An indictment accused defendant of two counts of arson - N.J.S.A. 2A:89-1. A third count charged him with the felony murder of Earl Redding.

The arsons allegedly occurred on May 11 and May 13,1972 on premises known as 11 Bedford Street, Newark, a multifamily apartment dwelling. Redding, a visitor in an apartment on the involved premises, died of smoke inhalation as a result of the May 13th fire.

Tried to a jury defendant was found guilty of starting the May 13th fire and Redding's murder. He was acquitted of

Appendix A
A-1

APPENDIX A

A-1

the May 11th episode. Sentences of life imprisonment on the murder conviction and a concurrent five to seven year term for the arson were imposed.

It is not necessary to detail the facts. It is enough to note that the principal inculpating evidence against the defendant was his signed confession. The purported motivation for the burnings was revenge against defendant's landlord. Defendant contended that the confession although signed was neither voluntary nor truthful, being the product of threats and force.

In his brief on this appeal defendant asserts -

"Point I — The Court's refusal to allow defense counsel to inquire into and present to the jury all the same circumstances attending the confession as were available when it (the Court) made its initial determination on its (the confession's) admissibility was denial of due process and prevented a fair trial.

Point II — Since the confession was not proven voluntary beyond a reasonable doubt at the preliminary hearing, the court should not have allowed the confession * * * to go in evidence.

Point III — The defendant's Sixth Amendment rights were violated. The due process requirement of fundamental fairness was violated as well.

Point IV — There were further violations of defendant's Sixth Amendment rights.

Point V — The Court's refusal to charge Clawans as to Chief Joseph L. Starrs, coupled with the prosecutor's comments on summation, warrant reversal.

Point VI — Since defendant's conviction of the May 13th arson merged with his conviction of the May 13th felony-murder, the arson conviction and sentence should be vacated.

A 2



Point VII — Since the defendant could have pleaded non-vult under N.J.S. 2A:113-3 and thus received less than a life sentence, his mandatory life sentence under N.J.S. 2A:113-4 should be set aside and he should be sentenced under N.J.S. 2A:113-3."

As to Point I, while we perceive error, we are satisfied, and beyond reasonable doubt, that it was not of a quality warranting reversal.

Following a voir dire hearing on whether defendant was given his rights as mandated by Miranda v. Arizona, 384 U.S. 436 (1966), the court below found that they had been and that defendant's confession was voluntary. During the hearing defendant testified that he had not been given the required warnings and that the police threatened him with a pistol and hit him with a book or books. He claimed that while he signed the statement he had not read it.

In its ruling the trial court included -

> "As far as the interrogation with respect to the statements, I hold that it is no longer an issue as to whether Miranda applies or is voluntary and I will restrict that phase of the questioning particularly on cross-examination."

Defense counsel thereafter queried the court on the restriction of cross-examination of the circumstances attendant the taking of the confession.

The court responded -

> "Just as to the voluntariness. I have ruled on Miranda. I will permit you to go into the circumstances as to the truthfulness, but not whether he was given his Miranda rights since that is no longer an issue."

The issue here presented was thoroughly aired and decided in State v. Hampton, 61 N.J. 250 (1972) -

A 3

> "[W]e hold for the future that the trial court alone shall determine (1) whether the Miranda warnings were given to the accused and his rights thereunder waived by him before the confession was given; and that if it finds the warnings were not given, or if given the rights not waived, the confession must be excluded, and (2) if those conditions were satisfied, whether in light of all the circumstances attending the confession it was given voluntarily. If these questions are resolved in favor of the State, then, without being advised of the court's decision, the jury shall be instructed that they should decide whether in view of all the same circumstances the defendant's confession is true. If they find that it is not true, then they must treat it as inadmissible and disregard it for purposes of discharging their function as fact finders on the ultimate issue of guilt or innocence." (emphasis added) [at 272]

Ordinarily then, as here, the giving of the Miranda warnings are part of the "same circumstances" a jury should have in passing upon "truthfulness" which the trial court employed in the determination of "voluntariness". It was error to foreclose this proof, but as noted earlier, not of a kind to set aside the conviction.

First, all of the circumstances surrounding the taking of statements, save Miranda, were articulated to the jury. (Defendant here made two statements, the first exculpatory.) Defendant's principal contention in our view was not a lack of Miranda warnings but rather that the damaging statement was coerced and that he had signed it under duress without being aware of its ultimate contents. The jury obviously rejected this stand. In this context then we perceive no reversible error whatever in delimiting testimony as to the giving of the warnings. In sum then, we are satisfied that the court correctly found that the

A4



incriminating statement was voluntarily given and that its error on the issue of truthfulness was not so harmful as to deprive defendant of a fair jury finding on the latter score. That ultimate jury determination, in our view, was validly grounded in the record.

As to defendant's Point VI, the State concedes, and we agree that - " * * * counts two (arson) and three (murder) should have been merged by the court when the judgment of conviction was entered." State v. Hubbard, 123 N.J. Super. 345 (App. Div. 1973). Accordingly, the conviction and consequent sentence for arson under Count II of Indictment No. 4554-71 are vacated.

Our review of the record satisfies us that as to defendant's Points II, III, IV, V and VII, set forth above, they are clearly without merit and warrant no discussion. R. 2:11-3(e)(2).

Accordingly, the judgment as modified herein, is affirmed.

A TRUE COPY.

Elizabeth M. Langhlin

Clerk

A-5

SUPREME COURT OF NEW JERSEY
C-250 SEPTEMBER TERM 1975

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

McARTHUR CORBITT,

Defendant-Petitioner

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is granted and it is further;

ORDERED that the certification is limited to the question of the validity of the mandatory life sentence upon a jury conviction for murder and it is further;

ORDERED that the parties file and serve briefs as to that question in accordance with the following schedule; appellant is to serve and file his brief within 21 days of the date hereof and respondent is to serve and file its brief within 21 days thereafter.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 18th day of February, 1976.

Florence R. Peskoe
Clerk

A TRUE COPY

Florence R. Peskoe

CLERK

B-1

APPENDIX B

B-1

APPENDIX C

Opinion in State v. Corbitt has not been filmed.

It can be found at 74 N.J. 379, 378 A. 2d 235 (1977).

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-98-76

MC ARTHUR CORBITT, :

Appellant, :

-v- :

STATE OF NEW JERSEY, :

Appellee. :

ORIGINAL
FILED
NOV 30 1977
Stephen W. Townsend
ACTING CLERK

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that McArthur Corbitt, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of New Jersey, affirming the judgment of conviction, entered herein on October 6, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

STANLEY C. VAN NESS
Public Defender
Attorney for Appellant
576 Central Avenue
East Orange, New Jersey 07018
201-673-7500

BY James K. Smith, Jr.
JAMES K. SMITH, JR.
Assistant Deputy Public Defender

Supreme Court, U. S.
FILED
MAR 20 1978
MICHAEL RODAK, JR., CLERK

# APPENDIX

## In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5903

McARTHUR CORBITT, APPELLANT

*v.*

STATE OF NEW JERSEY, APPELLEE

*ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY*

**DOCKETED DECEMBER 19, 1977**
**PROBABLE JURISDICTION NOTED FEBRUARY 21, 1978**

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5903

MCARTHUR CORBITT, APPELLANT

*v.*

STATE OF NEW JERSEY, APPELLEE

*ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY*

LIST OF DOCKET ENTRIES

| | |
|---|---|
| May 13, 1972 | Fire at 11 Bedford Street, Newark in which Earl Redding dies of smoke inhalation. |
| May 31, 1972 | McArthur Corbitt arrested after giving statement to Newark Arson Squad. |
| June 29, 1972 | Indictment No. 4554-71 filed in Essex County charging Corbitt with two counts of arson and one count of murder. |
| Apr. 2-10, 1973 | Jury trial before the Hon. Francis W. Hayden, J.C.C. Defendant convicted of murder and one count of arson, but acquitted on other arson count. |
| May 16, 1973 | Judge Hayden imposes mandatory life sentence. |
| July 31, 1973 | Defendant files Notice of Appeal to Superior Court of New Jersey, Appellate Division. |
| Sept. 23, 1975 | In an unpublished opinion the Appellate Division affirms Corbitt's conviction but merges murder and arson counts. |
| Oct. 20, 1975 | Notice of Petition for Certification filed with the Supreme Court of New Jersey. |
| Feb. 18, 1976 | Supreme Court of New Jersey grants certification limited to "the question of the validity of the mandatory life sentence upon a jury conviction for murder." |
| Feb. 22, 1977 | Oral argument before Supreme Court of New Jersey. |
| Oct. 6, 1977 | Supreme Court of New Jersey affirms in a 5 to 2 decision. |
| Nov. 30, 1977 | Notice of Appeal filed with the Supreme Court of New Jersey. |
| Dec. 19, 1977 | Appeal docketed in the Supreme Court of the United States. |
| Jan. 20, 1978 | Motion to Dismiss filed. |
| Feb. 21, 1978 | Supreme Court of the United States grants appellant's motion to proceed *in forma pauperis* and notes probable jurisdiction. |

4554

Superior Court of New Jersey
ESSEX COUNTY
(Law Division — Criminal)

1971 Term

FILED
JUN 29 1972
NICHOLAS V. CAPUTO
Clerk

THE STATE OF NEW JERSEY
vs.
MC ARTHUR CORBITT

*Defendant*

INDICTMENT (3 counts)
ARSON AND
~~FOR~~
MURDER

A True Bill
[signature]
*Foreman.*

GRAND JURY NO. 7301,7301A

Plea:

Bail:

Presented: JUN 29 1972

The within indictment is assigned [illegible] by the Essex County Court

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that McArthur Corbitt on the 11th day of May, 1972 at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did maliciously and wilfully burn a building known as 11 Bedford Street, in the City of Newark, County of Essex aforesaid contrary to the provisions of N.J.S. 2A:89–1 and against the peace of this State, the government and dignity of the same.



SECOND COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that McArthur Corbitt on the 13th day of May, 1972 at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did maliciously and wilfully burn a building known as 11 Bedford Street, in the City of Newark, County of Essex aforesaid contrary to the provisions of N.J.S. 2A:89–1 and against the peace of this State, the government and dignity of the same.

THIRD COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that McArthur Corbitt on the 13th day of May, 1972 at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did wilfully, feloniously and of his malice aforethought kill and murder Earl Redding against the peace of this State, the government and dignity of the same.

JOSEPH P. LORDI,
*County Prosecutor.*
By: _____.

[NEW JERSEY STATUTES ANNOTATED]

2A:113–1. *Murder*

If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, coroner, constable or other officer of justice, either civil or criminal, of this state, or a marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring

to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing is guilty of murder.

2A:113–2. *Degrees of murder; designation in verdict*

Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree.

2A:113–3. *Murder; plea of guilty not to be received; plea of non vult nolo contendere and sentence thereon*

In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.

Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

2A:113–4. *Murder; punishment*

Every person convicted of murder in the first degree, has aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.

Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.



ESSEX COUNTY
LAW DIVISION-CRIMINAL
JUDGMENT SHEET

Form A

FILED MAY 16, 1973

THE STATE OF NEW JERSEY

INDICTMENT NO. 4554-71

ACCUSATION NO. _____

COMPLAINT NO. _____

Mc Arthur Corbitt
Defendant

ATTORNEY John Mc Mahon

PROSECUTOR L. Barbieley

COURT REPORTER Thelma Hall

The defendant, being charged on July 17, 1972
Date

On Indictment No. 4554-71 Accusation No. _____.

Complaint No. _____ for the crime of arsal, arson murder (3)

and the defendant having pleaded _____ GUILTY X NOT GUILTY

and thereafter, having on April 10, 1973
Date

~~RETRACTED PLEA OF NOT GUILTY AND ENTERED PLEA OF GUILTY~~

X BEEN TRIED- with ~~without~~ A JURY AND A VERDICT - FINDINGS

of Guilty 2nd count arson
guilty 3rd count - Murder having been rendered.

It is, therefore, on May 16, 1973
Date

ordered and adjudged that the defendant be and is sentenced to:

2nd count - arson and 3rd count, murder.
3rd count - Murder, State Prison Trenton for rest of natural life, 2nd count arson, State Prison, Trenton for not less than 5 years, not more than 7 years, to run concurrent to sentence imposed on 3rd count above.

Entered by
Michael Ravens

Judge

[2] [SENTENCING, STATE V. MCARTHUR CORBITT, MAY 16, 1973]

The COURT. This was a trial before me by jury in which the defendant was indicted on two counts of arson and the third count, murder.

The jury acquitted him on the first count of the arson, found him guilty of the second count of arson and found him guilty of the murder arising out of the arson.

You've read the Presentence Report, Mr. McMahon?

Mr. McMAHON. Yes, sir, your Honor. Before I address myself to the Presentence Report, I'd like to address myself to the sentence in question, the statute in question, if I may.

The COURT. All right.

Mr. McMAHON. Your Honor, I would first ask that this Court not sentence on the arson but sentence only on the murder since I believe that the murder itself was founded on the arson, either on the felony-murder theory or on the first degree murder statute itself, murder being by arson. I think to sentence on both of these charges is an error.

As I indicated to the Court, I thought it was an error to charge the jury on both of the charges at the time that this case went to the jury, and I think the arson is incorporated in the murder conviction.

Secondly, your Honor, I think that the Court should not be bound to sentence this man to life under the 2A:113–2, but should be free to sentence this man as if he had pleaded non vult under 2A:113–3 in that the recent case, the *Jackson* case of the United States Supreme Court and the New Jersey State Supreme Court in *State* v. *White* in throwing out the death penalty recognized that a person cannot be put in jeopardy, put himself in the jeopardy of a greater punishment by going to trial than were he to plead guilty and that's the situation we have here.

This man exercised his right to go to trial. He was convicted of an offense which, if he had pleaded to, you could sentence him to anywhere from a suspended sentence to life imprisonment.

The COURT. Only at the time of—and ordinarily that's by way of plea bargaining if he pleads to the indictment with a recommendation for the purposes of sentence to be considered a plea on the second-degree murder.

Mr. McMAHON. Your Honor, if he pleads non vult to the first-degree murder indictment, you may sentence him to life or you may sentence him to a sentence sequel to second-degree, that is, second-degree.

The COURT. This was not a plea of non vult. This was a conviction under the statute.

Mr. McMAHON. The only difference being that he exercised his right to go to trial. What I am saying now, it is unfair to punish him, and the punishment in this case for going to trial



is to take away the Court's discretion to [4] sentence him under the second-degree provisions. So I would ask that your Honor sentence under 2A:113–3 and allow that his sentence might be one of less than life.

The COURT. Do you wish to be heard further?

Mr. McMAHON. I'll be heard other than on the legal arguments.

The COURT. I'll hear you on all because I don't agree with your legal argument.

Mr. McMAHON. Your Honor, in regard to the Presentence Report, I would take exception to a number of items. Number one, on the first page the listing of a Margaret Smalls; she's denominated as "para," which I assume means paramour which has some connotation on the Probation Department's Report that she's this man's girlfriend. I think there is a different paramour. I can't help but feel its purpose—the man has a number of girlfriends. I would ask the Court to strike that.

Secondly, I'd ask the Court to strike the statement of James Rutledge in the Presentence Report. Mr. Rutledge was not called as a witness. We have no way of testing this statement. He was present in the court. The State chose not to call him. We can only assume, or I can only re-assume it's because of his unreliability that they didn't call him. And the probation officer used, as they so often do, this statement as a filler, rather than going out and doing some [5] leg work. I think that the Court should not take it into consideration and I think that the Presentence Report, because of that inclusion, because of the inclusion of the defendant's girlfriend as a paramour, is unreliable and should not be considered by the Court and the Court should order a new Presentence Report.

The COURT. Oh, I will not take those into consideration. Even as far as the Presentence Report, in view of my position on this, I don't know that that could in any way affect my judgment on it.

Mr. McMAHON. I assume from what the Court says, the Court feels he's bound to sentence to life.

The COURT. That's mandatory.

Mr. McMAHON. If that is the case, there is no need of my having anything else to say on behalf of the defendant.

The COURT. I am well aware and I'm aware of some of the cases. The statute, as I read it, is specifically restricted to a

257-699—78——2

plea of non vult. Now, this was a conviction by a jury of a felony-murder, and under a felony-murder, under that statute, the penalty is life imprisonment.

As I view the entire case and the case law, I find that I am powerless, even if I felt differently about it, that the sentence according to the statute, also your argument as to merger, and I am aware of a recent case—I think it was an armed robbery where they held that the robbery merged [6] with the murder, and the reasoning in that case I cannot conclude that it necessarily follows that an arson-murder would be decided on the same reasoning or the same logic. Both of those I do not intend to treat them as such.

McArthur Corbitt. Mr. Corbitt, as you are aware, you were convicted by a jury of a felony-murder arising out of an arson. As I've indicated to your counsel, as I view the statute and the verdict of the jury, I have no discretion in this sentence. I must follow the statute as I read it. The statute holds that on a felony-murder it is murder in the first degree.

On Indictment Number 4554 of the 1971 Term, on the third count, the murder count, I sentence you to New Jersey State Prison for the term of your natural life.

On the second count, the arson, I sentence you to New Jersey State Prison for a term of not less than five nor more than seven years, that term to run concurrently with the term I imposed on the third count.

You have 45 days within which to appeal any part of your case, but particularly you have 45 days within which to appeal my sentence.

Mr. McMahon. Thank you, Judge.

* * * * *

[6A] Court Reporter's certificate (omitted in printing).

Superior Court of New Jersey, Appellate Division

(Ind. No. 4554–71)

(Title omitted in printing)

*Criminal Action—Notice of Appeal—filed July 31, 1973*

TAKE NOTICE that the defendant, McArthur Corbitt, confined at New Jersey State Prison, Trenton appeals to the



Supreme Court, Appellate Division, from the final judgment of conviction of murder and arson entered on May 16, 1973, in the Superior Court, Law Division, Essex County, whereby a sentence of life on murder charge and 5 to 7 years concurrent on arson charge was imposed by the Honorable Francis Hayden.

Stanley C. Van Ness,
*Public Defender,*
*Attorney for Defendant-Appellant.*
By: Edward Weisslitz
Gerald T. Foley, Jr.,
*Deputy Public Defender.*

Clerk's certificate (omitted in printing).

Not for publication without the approval of the committee on opinions.

Superior Court of New Jersey, Appellate Division

(A–3457–72)

State of New Jersey, plaintiff-respondent,

*v.*

McArthur Corbitt, defendant-appellant.

Argued September 8, 1975—Decided September 23, 1975.

Before *Judges* Carton, Crahay and Handler.

On appeal from Essex County Court.

Mr. Carl Gottschall, *designated counsel,* argued the cause for appellant (Mr. Stanley C. Van Ness, *Public Defender, attorney*).

Mrs. Sara A. Friedman, *Assistant Prosecutor,* argued the cause for respondent (Mr. Joseph P. Lordi, *Essex County Prosecutor, attorney*).

PER CURIAM

An indictment accused defendant of two counts of arson—*N.J.S.A.* 2A:89–1. A third count charged him with the felony murder of Earl Redding.

The arsons allegedly occurred on May 11 and May 13, 1972 on premises known as 11 Bedford Street, Newark, a multifamily

apartment dwelling. Redding, a visitor in an apartment on the involved premises, died of smoke inhalation as a result of the May 13th fire.

Tried to a jury defendant was found guilty of starting the May 13th fire and Redding's murder. He was acquitted of the May 11th episode. Sentences of life imprisonment on the murder conviction and a concurrent five to seven year term for the arson were imposed.

It is not necessary to detail the facts. It is enough to note that the principal inculpating evidence against the defendant was his signed confession. The purported motivation for the burnings was revenge against defendant's landlord. Defendant contended that the confession although signed was neither voluntary nor truthful, being the product of threats and force.

In his brief on this appeal defendant asserts—

> *Point I.*—The Court's refusal to allow defense counsel to inquire into and present to the jury all the same circumstances attending the confession as were available when it (the Court) made its initial determination on its (the confession's) admissibility was denial of due process and prevented a fair trial.
>
> *Point II.*—Since the confession was not proven voluntary beyond a reasonable doubt at the preliminary hearing, the court should not have allowed the confession * * * to go in evidence.
>
> *Point III.*—The defendant's Sixth Amendment rights were violated. The due process requirement of fundamental fairness was violated as well.
>
> *Point IV.*—There were further violations of defendant's Sixth Amendment rights.
>
> *Point V.*—The Court's refusal to charge *Clawans* as to Chief Joseph L. Starrs, coupled with the prosecutor's comments on summation, warrant reversal.
>
> *Point VI.*—Since defendant's conviction of the May 13th arson merged with his conviction of the May 13th felony-murder, the arson conviction and sentence should be vacated.
>
> *Point VII.*—Since the defendant could have pleaded non-vult under *N.J.S.* 2A:113–3 and thus received less than a life sentence, his mandatory life sentence under *N.J.S.* 2A:113–4 should be set aside and he should be sentenced under *N.J.S.* 2A:113–3.



As to point I, while we perceive error, we are satisfied, and beyond reasonable doubt, that it was not a quality warranting reversal.

Following a *voir dire* hearing on whether defendant was given his rights as mandated by *Miranda* v. *Arizona*, 384 *U.S.* 436 (1966), the court below found that they had been and that defendant's confession was voluntary. During the hearing defendant testified that he had not been given the required warnings and that the police threatened him with a pistol and hit him with a book or books. He claimed that while he signed the statement he had not read it.

In its ruling the trial court included—

> As far as the interrogation with respect to the statements, I hold that it is no longer an issue as to whether *Miranda* applies or is voluntary and I will restrict that phase of the questioning particularly on cross-examination.

Defense counsel thereafter queried the court on the restriction of cross-examination of the circumstances attendant the taking of the confession.

The court responded—

> Just as to the voluntariness. I have ruled on *Miranda*. I will permit you to go into the circumstances as to the truthfulness, but not whether he was given his *Miranda* rights since that is no longer an issue.

The issue here presented was thoroughly aired and decided in *State* v. *Hampton*, 61 *N.J.* 250 (1972)—

> [W]e hold for the future that the trial court alone shall determine (1) whether the *Miranda* warnings were given to the accused and his rights thereunder waived by him before the confession was given; and that if it finds the warnings were not given, or if given the rights not waived, the confession must be excluded, and (2) if those conditions were satisfied, whether in light of all the circumstances attending the confession it was given voluntarily. If these questions are resolved in favor of the State, then, without being advised of the court's decision, the jury shall be instructed that they should

> decide whether *in view of all the same circumstances* the defendant's confession is true. If they find that it is not true, then they must treat it as inadmissible and disregard it for purposes of discharging their function as fact finders on the ultimate issue of guilt or innocence. (emphasis added) [at 272]

Ordinarily then, as here, the giving of the *Miranda* warnings are part of the "same circumstances" a jury should have in passing upon "truthfulness" which the trial court employed in the determination of "voluntariness". It was error to foreclose this proof, but as noted earlier, not of a kind to set aside the conviction.

First, all of the circumstances surrounding the taking of statements, save *Miranda,* were articulated to the jury. (Defendant here made two statements, the first exculpatory.) Defendant's principal contention in our view was not a lack of *Miranda* warnings but rather that the damaging statement was coerced and that he had signed it under duress without being aware of its ultimate contents. The jury obviously rejected this stand. In this context then we perceive no reversible error whatever in delimiting testimony as to the giving of the warnings. In sum then, we are satisfied that the court correctly found that the incriminating statement was voluntarily given and that its error on the issue of truthfulness was not so harmful as to deprive defendant of a fair jury finding on the latter score. That ultimate jury determination, in our view, was validly grounded in the record.

As to defendant's Point VI, the State concedes, and we agree that—"* * * counts two (arson) and three (murder) should have been merged by the court when the judgment of conviction was entered." *State* v. *Hubbard,* 123 *N.J. Super.* 345 (App. Div. 1973). Accordingly, the conviction and consequent sentence for arson under Count II of Indictment No. 4554–71 are vacated.

Our review of the record satisfies us that as to defendant's Points II, III, IV, V and VII, set forth above, they are clearly without merit and warrant no discussion. *R.* 2:11–3(e)(2).

Accordingly, the judgment as modified herein, is affirmed.

A True Copy.

ELIZABETH MCLAUGHLIN,
*Clerk.*



Superior Court of New Jersey—Appellate Division

(Docket No. A–3457–72)

(Title omitted in printing)

*Criminal Action—Notice of Petition for Certification*

TAKE NOTICE that the defendant, McArthur Corbitt confined at New Jersey State Prison, Trenton, New Jersey petitions for certification to this Court from its judgment of September 23, 1975 which affirmed his conviction of felony murder for which defendant is serving a sentence of life imprisonment. Defendant is in custody.

STANLEY C. VAN NESS,
*Public Defender,*
*Attorney for Defendant-Petitioner.*
By: John H. Ratliff,
JOHN H. RATLIFF,
*Assistant Deputy Public Defender.*

Supreme Court of New Jersey, C–250, September Term 1975

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT,

*v.*

MCARTHUR CORBITT, DEFENDANT-PETITIONER

*On Petition for Certification*

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is granted and it is further;

ORDERED that the certification is limited to the question of the validity of the mandatory life sentence upon a jury conviction for murder and it is further;

ORDERED that the parties file and serve briefs as to that question in accordance with the following schedule; appellant is to serve and file his brief within 21 days of the date hereof and respondent is to serve and file its brief within 21 days thereafter.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 18th day of February, 1976.

A True Copy.

FLORENCE R. PESKOE,
*Clerk.*

Supreme Court of New Jersey

1977

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT,
*v.*
McARTHUR CORBITT, DEFENDANT-APPELLANT

Argued February 22, 1977—Decided October 6, 1977

SYNOPSIS

Defendant's conviction of murder and arson was affirmed by the Superior Court, Appellate Division, and certification was granted. The Supreme Court, Conford, P. J. A. D., temporarily assigned, held that the sentencing scheme of the murder statute, whereby a person who pled non vult or nolo contendere to the charge could receive a penalty of life or not more than 30 years, while a person who was convicted of murder in the first degree by a jury would receive a mandatory life sentence, did not infringe on defendant's Fifth Amendment right to plead not guilty, or his Sixth Amendment right to jury trial, nor did it deprive defendant of equal protection.

Affirmed.

Sullivan, J., filed a dissenting opinion.

Pashman, J., filed a dissenting opinion.

---

1. *Constitutional law* ⇐270
*Homicide* ⇐351
*Jury* ⇐31(11)

Sentencing scheme of murder statute, whereby person who pled non vult or nolo contendere to charge could receive penalty of life or not more than 30 years, while person who was convicted by jury would receive mandatory life sentence, did not infringe upon defendant's Fifth Amendment right to plead not guilty or his Sixth Amendment right to jury trial. *U. S. C. A. Const.* Amends. 5, 6.



2. *Constitutional law* ⇐270

Sentencing scheme providing for disparity between potential penalty upon conviction and that upon plea of guilty does not infringe upon Fifth Amendment rights where the potential penalty upon conviction by jury is imprisonment rather than death penalty. *U. S. C. A. Const.* Amend. 5.

3. *Constitutional law* ⇐250.3(1)
*Homicide* ⇐351

Sentencing scheme of murder statute, whereby person who pled non vult or nolo contendere to charge could receive penalty of life or not more than 30 years, while person who was convicted by jury would receive mandatory life sentence, did not deny equal protection. *N. J. S. A.* 2A: 113-3, 4; *U. S. C. A. Const.* Amend. 14.

4. *Constitutional law* ⇐250.3(1)

In area of classification of criminal or penal offenders for purpose of penalty or punishment, Legislature may provide for differences of treatment so long as there is some rational connection between classification and proper legislative purpose. *U. S. C. A. Const.* Amend. 14.

5. *Constitutional law* ⇐213.1(2)

Legislature is not required to formulate plan that seems most rational or sound to court to satisfy requirement of equal protection, but it is sufficient if any rational basis relevant to proper purpose underlies classification and attendant treatment of classes affected. *U. S. C. A. Const.* Amend. 14.

---

*Mr. James K. Smith, Jr.*, Assistant Deputy Public Defender, argued the cause for appellant (*Mr. Stanley C. Van Ness*, Public Defender, attorney).

*Mr. R. Benjamin Cohen*, Assistant Prosecutor, argued the cause for respondent (*Mr. Joseph P. Lordi*, Essex County Prosecutor, attorney).

*Mr. David S. Baime*, Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Baime* and *Ms. Jane E. Deaterly*, Deputy Attorney General, of counsel and on the brief).

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*Mr. Forrest R. Goodrum* filed a brief on behalf of *amicus curiae* American Civil Liberties Union (*Ms. Marilyn J. Morheuser*, of counsel).

The opinion of the court was delivered by

CONFORD, P. J. A. D., Temporarily Assigned. At issue in this case is the constitutionality of the sentencing scheme of the New Jersey murder statute, *N. J. S. A.* 2A:113–3 and *N. J. S. A.* 2A:113–4, as judicially altered in *State v. Funicello*, 60 *N. J.* 60 (1972) (*"Funicello III"*), *cert.* den. *sub nom. New Jersey v. Presha*, 408 *U. S.* 942, 92 *S. Ct.* 2849, 33 *L. Ed.* 2d 766 (1972). Defendant asks the Court to find: (1) that under *United States v. Jackson*, 390 *U. S.* 570, 88 *S. Ct.* 1209, 20 *L. Ed.* 2d 138 (1968), the sentencing scheme of the act impermissibly infringes upon an accused's Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial; and (2) that, apart from the *Jackson* rule, the scheme deprives an accused of the equal protection of the laws.

In view of the limitation of the issues herein by our order of certification, the factual background may be capsulated. On May 11 and 13, 1972 fires occurred at a Newark multi-family dwelling. A visitor at the premises died from smoke inhalation because of the second fire. Defendant confessed to setting both fires to obtain revenge against his landlord. On April 10, 1973 a jury acquitted defendant of arson in relation to the May 11 fire but it found him guilty of arson in connection with the May 13 fire and of murder of the visitor. The murder charge had been tried on a felony murder theory. Defendant was sentenced to life imprisonment for the murder and given a concurrent five to seven year prison sentence for the arson.

On appeal the Appellate Division, in an unreported opinion, affirmed the murder conviction but vacated that for arson on grounds of merger. We granted certification but expressly "limited to the question of the validity of the mandatory life sentence upon a jury conviction for murder." 69 *N. J.* 447 (1976).

## I

### *Alleged Infringement Upon Fifth Amendment and Sixth Amendment Rights*

[1] The basic issue before us is whether the decision in *United States v. Jackson, supra*, which held unconstitutional



the death penalty provision of the Federal Kidnapping Act under the sentencing scheme of the act, condemns as invalid our murder sentencing scheme as revised by this Court after the statute, with a provision for a death penalty, was held unconstitutional by the United States Supreme Court in *Funicello v. New Jersey*, 403 *U. S.* 948, 91 *S. Ct.* 2278, 29 *L. Ed.* 2d 859 (1971) (*"Funicello* II"). Comprehension of the opposing views in the case requires our outlining the history of the litigation over the validity of the murder statute before and after its judicial recasting in *Funicello* III.

### *A*

Prior to *Funicello* III our statutes [1] concerning pleading and sentencing for murder read as follows:

> *N. J. S. A.* 2A:113–3
>
> In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.
>
> Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.
>
> *N. J. S. A.* 2A:113–4
>
> Every person convicted of murder in the first degree his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.
>
> Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.

Judgments of death were pronounced under those statutes upon Leo R. Forcella and Victor R. Funicello and affirmed on

[1] The Legislature has passed a bill to revise the statutes concerning murder which provides for imposition of the death penalty in certain cases Senate No. 630. It is awaiting action by the Governor.

direct appeal in *State v. Forcella*, 35 *N.J.* 168 (1961), *cert.* den. 369 *U. S.* 866, 82, *S. Ct.* 1035, 8 *L. Ed.* 2d 86 (1962) and *State v. Funicello*, 49 *N. J.* 553 (1967) (*"Funicello* I"), *cert.* den. 390 *U. S.* 911, 88 *S. Ct.* 837, 19 *L. Ed.* 2d 882 (1968). Post-conviction proceedings were brought by both, and before their final disposition the United States Supreme Court decided *United States v. Jackson, supra* 390 *U. S.* 570, 88 *S. Ct.* 1209, 20 *L. Ed.* 138.

*Jackson* involved a death sentence under the Federal Kidnapping Act. That statute provided that kidnapping and interstate transportation of the victim should under specified circumstances be punished by death if the verdict of the jury should so recommend or by imprisonment for any term of years or for life if the death penalty was not imposed. As the statute was construed, the death penalty could not be imposed upon a defendant who waived jury trial or pleaded guilty. The Supreme Court held the death penalty provision invalid, but severable from the remainder of the act. It reasoned that since a defendant could assuredly avoid the death penalty only by pleading guilty or proceeding to trial before a judge, he was "needlessly encourage[d]" to waive his constitutional rights not to incriminate himself, as by a plea of guilt (Fifth Amendment) and to have a jury trial should he plead not guilty (Sixth Amendment). 390 *U.S.* at 583, 88 *S. Ct.* 1209. While recognizing the Legislature's legitimate interest in permitting a jury to mitigate the rigors of capital punishment, the Court felt that goal could not be pursued by "penalizing those defendants who plead not guilty and demand jury trial". *Id. at* 582, 88 *S. Ct.* at 1217. It cited state statutes which make the jury the arbiter of capital punishment no matter how the defendant's guilt is determined. *Ibid.*

Forcella, Funicello and others similarly situated brought the *Jackson* holding to the attention of the New Jersey courts in their post-conviction proceedings, arguing that it was direct authority for the invalidity of the death penalty provision in our murder statute in that only upon a trial did a defendant risk a verdict of death, not by offer and acceptance of a plea of *non vult*. Thus there existed the same needless "chilling", as in *Jackson*, of the right to contest guilt and to have a jury at the trial of the issue. In an opinion by Chief



Justice Weintraub for a majority of the Court, the argument was rejected, *Jackson* being distinguished. *State v. Forcella*, 52 *N. J.* 263 (1968). It was pointed out that our statutory scheme differed from that in *Jackson* because a defendant could not be tried by a judge but only before a jury, and therefore the Sixth Amendment claim was without merit. *Id.* at 270–272. The purpose of the provision was "humane" and not a "needless" discouragement of the right to contest guilt, as in *Jackson*, and thus the Fifth Amendment was not offended. *Id.* at 280.

Justices Jacobs and Hall dissented. They concluded that *Jackson* compelled the elimination of the death penalty from the New Jersey sentencing scheme but that the statute could be rehabilitated by substituting life imprisonment therefor, without the necessity of scrapping the defendant's option to offer to plead *non vult* and be allowed the potential of a lesser penalty. 52 *N.J.* at 294–302.

On petition for *certiorari* the United States Supreme Court summarily, and without argument, reversed the *Forcella* holding three years later in a brief memorandum whose substantive content was confined to the statement:

> Judgment, insofar as it imposes the death sentence, reversed and case remanded to the Supreme Court of New Jersey for further proceedings. *Funicello v. New Jersey*, 403 *U. S.* 948, 91 *S. Ct.* 2278, 29 *L. Ed.* 2d 859 (1971) (*"Funicello* II").

The only explanation given for the ruling was the citation of *Witherspoon v. Illinois*, 391 *U.S.* 510, 88 *S. Ct.* 1770, 20 *L. Ed.* 2d 776 (1968), and similar cases [2] and of the *Jackson* case.

Upon remand to this Court, in *Funicello III, supra* (69 *N. J.* 60), the Court "accept[ed] the conclusion that the United States Supreme Court has declared the death penalty to be unconstitutional under our statute". *Id.* at 67. Considering the provision for the death penalty severable from the statute, the court ordered all death sentences vacated, and it directed that

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[2] Those cases held that a venireman in a capital case should not be excused for cause solely because he expressed opposition to the death penalty and entertained conscientious scruples against inflicting it. This was not a real issue in the New Jersey cases. See *Funicello* III (60 *N.J.* at 67).

all pending or future indictments for murder be prosecuted on the basis that upon the jury's verdict of murder in the first degree the penalty should be life imprisonment. Pleas to an indictment for murder were to continue to be governed by *N. J. S. A.* 2A: 113–3. Id. at 67–68. In effect, the Court adopted the position of the dissenting Justices in *State v. Forcella, supra.*

The United States Supreme Court denied *certiorari* to review that determination. *New Jersey v. Presha, supra* 408 *U.S.* 942, 92 *S. Ct.* 2849, 33 *L. Ed.* 2d 766.

Viewed in relation to the rationale of *Jackson*, the following possibly pertinent differences are apparent between the sentencing scheme under the federal kidnapping statute dealt with in *Jackson* and that of our present statute,[3] as recast by our courts: (1) there was a possibility of a death penalty after conviction under the federal act; only life imprisonment under ours; (2) the maximum punishment after conviction under the federal act was greater than that upon a plea of guilt; the maximums are the same under our act; and (3) trials by either judge or jury were available under the federal act, with the possibility of the maximum penalty (death) only when the trial was with a jury; under our statute a trial can be only by jury.

The State contends that differences (1) and (2) are each sufficient to distinguish our statute from the federal one and to justify a conclusion that ours imposes no "needless" burden on the defendant's Fifth Amendment rights, such as prohibited by *Jackson*. It also argues that difference (3) precludes the conclusion of infringement upon Sixth Amendment rights. The defendant argues that the substantial difference in potential *minimum* sentences between that upon conviction after trial and that upon a plea of *non vult* under our statute is such as to render operative the rationale of *Jackson* insofar as infringement upon Fifth Amendment rights is concerned; and, moreover, that any impermissible burden on the option of the defendant to go to trial at all necessarily also burdens the Sixth Amendment right to have a jury trial.

As we view the basic underlying question posed by defendant's contention, it is whether the doctrine of *Jackson* constitutionally precludes a statutory sentencing scheme for murder wherein provision for a fixed sentence (less than death) on

[3] References to our present statute are to be understood in the light of the recasting thereof by the Court in *Funicello* III.



a conviction may co-exist with one for the taking of a plea of *non vult* (or guilt) with the possibility of the sentencing court imposing a substantially lesser sentence. The defendant responds to that question in the affirmative. He regards any substantial statutory inducement to plead rather than go to trial as *ipsco facto* invalid. Our study of the cases, particularly decisions of the United States Supreme Court subsequent to *Jackson*, satisfies us that the correct conclusion is to the contrary and that our present statute is unexceptionable on either Fifth or Sixth Amendment grounds.

*B*

The Sixth Amendment problem need not long detain us. In *Jackson*, the right to a jury trial was implicated because trial before a judge rather than a jury assured immunity from a death sentence. If the contrast between one method of trial involving the possibility of death (jury trial) and another free from it imposes an intolerable and needless pressure on the defendant to choose the latter, as held by *Jackson*, the right of trial by jury was of course compromised.[4] But if, as under our statute, the defendant is triable only by jury, if at all, no invasion of the right of jury trial, as such, is apparent. *State v. Forcella, supra* 52 *N.J.* at 269–270. If, however, because of the New Jersey statutory option of a defendant to tender a plea of *non vult*, which, if accepted, has the potential of a sentence substantially less than on conviction, of first degree murder, defendant has suffered intolerable and needless discouragement of his right to go on trial at all, then defendant has necessarily suffered infringement of both his Fifth and Sixth Amendment rights. But if, on the other hand, it is concluded that whatever discouragement in involved in the scheme is not an impermissible infringement on Fifth Amendment rights, so that the provision for a plea of *non vult* is valid, the Sixth Amendment question becomes moot. The latter issue is thus determinative of the entirety of the *Jackson* phase of the case.

[4] Accord: *Spillers* v. *State*, 84 *Nev.* 23, 436 *P.* 2d 18 (Sup. Ct. 1968) (rape accompanied by extreme violence and great bodily harm subject to imprisonment for not less than 20 years, or death if so declared by jury; trial by bench available on waiver by state and defendent).

*C*

We consider, first, the merits of the State's position that the *Jackson* problem is satisfactorily resolved by the circumstance that under the statute the defendant is subject to the same maximum sentence whether he is convicted or pleads *non vult—i. e.,* life imprisonment. It is pointed out that under the federal kidnapping act, by contrast, the potential maximum on a plea of guilty was less than on a conviction at a jury trial. The argument is that *Jackson* emphasized the certainty of avoidance by a plea of the potential maximum after a trial. The Appellate Division has upheld the State's thesis. *State v. Hubbard,* 123 *N. J. Super.* 345, 351–352 (1973), certif. den. 63 *N. J.* 325 (1973); *State v. Land,* 124 *N. J. Super.* 303, 306 (1973). It has also so been held uniformly elsewhere. *Commonwealth v. Hargrove,* 434 *Pa.* 393, 254, *A.* 2d 22 (Sup. Ct. 1969); *Sims v. Eyman,* 405 *F.* 2d 439 (9 Cir. 1969); *State ex rel. Strickland v. Melton.* 152 *W. Va.* 500, 165 *S. E.* 2d 90 (Sup. Ct. App. 1968); *State v. Harper,* 251 *S. C.* 379, 162 *S. E.* 2d 712 (Sup. Ct. 1968); *cf. State v. Beal,* 470 *S. W.* 2d 509 (Sup. Ct. Mo. 1971); *Lyons v. Howard.* 434 *F.* 2d 632 (6 Cir. 1970); *People v. Coogler,* 71 *Cal.* 2d 153, 77 *Cal. Rptr.* 790, 454 *P.* 2d 686 (Sup. Ct. 1969), *cert.* den. 406 *U. S.* 971, 92 *S. Ct.* 2417, 32 *L. Ed.* 2d 672 (1972).

We are not, however, persuaded that the point thus made is necessarily dispositive of the *Jackson* thrust. If the invariable or almost invariable practice were to accord the pleading defendant a substantially lesser sentence than that mandated on a conviction, the argument of pressure to avoid a trial by pleading guilty (aside from the other distinguishing considerations later to be discussed herein) would have logical merit even though the statute facially allowed imposition, on the taking of a plea, of the same penalty required in case of conviction after trial. See *Commonwealth v. Hargrove, supra,* 254 *A.* 2d at 24; *cf. Roman v. Parrish,* 328 *F. Supp.* 882 (E. D. Va. 1971). We need not pursue the point, however, as we are convinced, for reasons to be fully stated, that the *Jackson* case is not today authority for unconstitutionality where the maximum sentence imposable on conviction after trial is less than death; or, that if the principle is not automatically inapplicable in such a case, the New Jersey sentencing scheme is nevertheless valid notwithstanding the incidence of some encouragement or pressure on a defendant to plead guilty. We proceed with our reasons for those conclusions.



*D*

On its face, the opinion of the Court in *Jackson* left an ambiguity as to whether the gravamen of the holding was the overwhelmingly intimidating effect of a possible death penalty on the defendant's decision to contest his guilt or, rather, the unacceptability of any scheme which made the tender of a plea of guilt a more attractive prospect in terms of potential punishment than taking the chance of an adverse verdict at a trial. A number of allusions in the opinion to the gravity of the defendant's dilemma support the first view: "* * * the defendant's assertion of the right to jury trial may cost him his life * * *", 390 *U.S.* at 572, 88 *S. Ct.* at 1211; "Under the Federal Kidnapping Act * * * the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. One problem is to decide whether the Constitution *permits the establishment of such a death penalty,* applicable only to those defendants who assert their right to contest their guilt before a jury." *Id.* at 581, 88 *S. Ct.* at 1216 (emphasis added).

On the other hand, seeming to support the necessity of exact equivalence of potential punishment under either a plea or a contest, was the Court's insistence that the evil it perceived was not that the federal statute necessarily "coerced" guilty pleas but that it "needlessly *encourage*[*d*]" them, 390 *U. S.* at 583, 88 *S. Ct.* 1209 (emphasis in the original). Thus, in responding to the Government's contention that the jury option for life imprisonment rather than death was a laudable statutory effort "to mitigate the severity of punishment", the Court said that objective could not be pursued by "penalizing those defendants who plead not guilty and demand jury trial". *Id.* at 582, 88 *S. Ct.* at 1217. It pointed out that the permissible objective had been constitutionally achieved in Washington and California by statutes which left the choice between life imprisonment and capital punishment to a jury in every case, regardless of how defendant's guilt had been determined. *Ibid.*

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The issue for present purposes then boils down to the question whether there is a "needless" encouragement of guilty pleas in a statutory disparity between either maximum or minimum punishment on conviction and on a guilty plea when the death penalty is not involved. Dissenting in *State v. Forcella, supra*, Justices Jacobs and Hall clearly foresaw the issue we now face and answered the posed question in the negative. They concluded that the only repair of our statute required by *Jackson* was the substitution of life imprisonment for the death penalty. They disagreed with the majority, whose view it was, as expressed by Chief Justice Weintraub, that if our statute was vulnerable under *Jackson*, the indicated cure was to abolish the plea of *non vult* rather than the death penalty. 52 *N. J.* at 282, 283. Responding to the suggestion in the opinion of the majority that even if the death penalty were eliminated from the statute, it would still "involve a *Jackson*-type difficulty in that one who stood trial would receive a life sentence for first-degree murder while a defendant whose *non vult* plea was accepted could receive a sentence for a term of years" (52 *N. J.* at 282), the dissenters said (*Id.* at 300–301):

> The majority suggests that striking of the death penalty might still leave a "*Jackson*-type difficulty" in that a defendant who pleads *non vult* would receive life or a term of years whereas a defendant found guilty by a jury of first degree murder would necessarily receive life. But the jury might return a lesser verdict and, in any event, the inducement here would be insignificant when compared to the death penalty stricken in *Jackson*. The law has always been administered with pragmatic recognition of the fact that the difference between the death penalty and imprisonment entails more than matters of logic and degree. See *State v. Laws, supra*, 51 *N. J.* 494; *cf. Meszaros v. Gransamer*, 23 *N. J.* 170, 188 (1957); *State v. Wolf*, 40 *N. J.* 301, 308 (1966). *Jackson* was concerned solely with the grisly choice between a plea or waiver with an assurance of no death penalty, and a jury trial with the danger of a death penalty; it was not at all concerned with and did not mention the lesser inducements incident to the ordinary, though nonetheless troublesome, 'plea bargaining.' See Arnold, *Law Enforcement—An Attempt at Social Dissection*, 62 Yale L. J. 1 (1932); Note, *Guilty Plea Bargaining*, 112 *U. Pa. L. Rev.* 865, 878 (1964).



The soundness of the foregoing analysis of the parameters of *Jackson* has been fortified by subsequent decisions of the United States Supreme Court. In the first place, when *Forcella* came to be reviewed by the Supreme Court, it summarily struck the death sentences of the several petitioners. *Funicello II, supra*. Significantly, the Court did not suggest that our statute also required revision to eliminate the disparity between potential penalties on a plea of guilty and after a trial. And when our Court thereafter recast the statute in *Funicello III, supra*, the Supreme Court denied review. *New Jersey v. Presha, supra* 408 *U.S.* 942, 92 *S. Ct.* 2819, 33 *L. Ed.* 2d 766.

Revealing light as to why the United States Supreme Court refused to disturb our statutory scheme beyond striking the death penalty is afforded by two of the opinions in the *Brady* trilogy of the Court announced May 4, 1970 (a date between the decision in *Jackson*, and the Court's ruling in *Funicello* II, *supra*). *Brady v. United States*, 397 *U. S.* 742, 90 *S. Ct.* 1463, 25 *L. Ed.* 2d 747; *McMann v. Richardson*, 397 *U. S.* 759, 90 *S. Ct.* 1441, 25 *L. Ed.* 2d 763; *Parker v. North Carolina*, 397 *U. S.* 790, 90 *S. Ct.* 1458, 25 *L. Ed.* 2d 785.

*Brady* involved an attempt by a federal prisoner to be relieved of a plea of guilty under the same kidnapping statute as was involved in *Jackson*. He had faced the prospect of a possible death penalty if tried and convicted, and he urged that his plea of guilty was coerced by the same considerations which had led the Court in *Jackson* to declare the death penalty unconstitutional. The Court stated that the petitioner had "read far too much into the *Jackson* opinion." 397 *U. S.* at 746, 90 *S. Ct.* at 1468. It said that while *Jackson* prohibited the imposition of the death penalty under the kidnapping act it had not fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the previous test that guilty pleas are valid if both voluntary and intelligent. *Id.* at 747, 90 *S. Ct.* 1463, 25 *L. Ed.* 2d 747. The coercive effect of the statute recognized in *Jackson* did not render the actual plea in *Brady* involuntary where it was tendered on advice of counsel and with the consciousness of the strength of the Government's case against the defendant. *Id.* at 749–750, 90 *S. Ct.* 1463, 25 *L. Ed.* 2d 747.

What is of especial significance here is the Court's obvious equation in *Brady* of the trial-plea differential in potential punishment under the federal statute with precisely similar situa-

tions in plea negotiations and agreements as generally practiced and generally approved in this country.[5]

The Court stated (397 *U.S.* at 751, 90 *S. Ct.* at 1470):

> Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, *the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty.* We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged. (Emphasis added.)

It is quite obvious that if defendant's present contention that the range of punishment, maximum and minimum, must constitutionally be the same on a conviction of crime after trial and upon tender and acceptance of a plea of guilty or *non vult*, a factor essential to successful plea negotiation is practically precluded from operation, *i. e.*, "the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged". *Brady, supra*, 397 *U. S.* at 751, 90 *S. Ct.* at 1470. Defendant's present argument would forbid a sentencing scheme which even renders *possible* a lesser punishment on a plea of guilt than on a conviction after trial. The damage to legitimate criminal-justice-administration considerations inherent in defendant's position is clear from the *Brady* Court's demonstration of the desirability of productive plea negotiations. It said (307 *U.S.* at 751–752, 90 *S. Ct.* at 1471):

> The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and *because both the State and the defendant often find it advantageous to preclude the possibility of the maximum authorized by law.* For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustains its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury. (Emphasis added.)

The Court concluded that acceptance of the defendant's position (397 *U.S.* at 753, 90 *S. Ct.* at 1471):

> * * * would require the States and Federal Government to forbid guilty pleas altogether, to provide a single

[5] See *Santobello* v. *New York*, 404 U.S. 257, 262, 92 *S. Ct.* 495, 30 *L. Ed.* 2d 427 (1971); *State* v. *Gibson*, 68 N.J. 499 (1975); *State* v. *Thomas*, 61 *N.J.* 314, 322 (1972); *State* v. *Taylor*, 49 *N.J.* 440, 445 (1967).

> invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained.[6]

In the same year that *Brady* was decided, the Supreme Court rendered its opinion in *North Carolina v. Alford*, 400 *U.S.* 25, 91 *S. Ct.* 160, 27 *L. Ed.* 2d 162 (1970). In holding that a defendant (who entered a plea of guilty to second degree murder under a North Carolina murder statute with a death penalty provision for first degree murder similar to the federal kidnapping statute involved in *Jackson*) was not entitled to withdraw his guilty plea, even where at the time he gave the plea he said he was not guilty, the Court reiterated that it was not unconstitutional for a state to adopt a procedure under which a defendant would receive a lesser penalty in exchange for a guilty plea. It said (400 *U.S.* at 38–39, 91 *S. Ct.* at 168):

> Relying on *United States v. Jackson, supra*, Alford now argues in effect that the State should not have allowed him this choice but should have insisted on proving him guilty of murder in the first degree. The States in their wisdom may take this course by statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances. But this is not the mandate of the Fourteenth Amendment and the Bill of Rights. The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counter-productive and put in jeopardy the very human values they were meant to preserve.[7]

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[6] A holding of the Supreme Court parallel to that in *Bradly* was rendered in the third of the trilogy of cases cited, *Parker v. North Carolina, supra* 397 *U.S.* 790, 90 *S. Ct.* 1458, 25 *L. Ed.* 2d 785. The petitioner there had been indicated for first-degree burglary under a state statute which provided for the death penalty for that offense unless the jury recommended life imprisonment. If a plea of guilty was accepted the punishment would be life imprisonment. The defendant pleaded guilty and was sentenced to life imprisonment. He thereafter sought an invalidation of the plea partly on *Jackson* grounds. The court rejected the argument on the rationale of *Brady*.

[7] The significance of *Brady*, *Parker* and *Alford* in reducing the threat of an expansive view of *Jackson* to the whole concept of plea negotiations is highlighted by the literature in relation to *Jackson* published before the decisions in *Brady* and the other cited cases. See, *e.g.*, Comment, 54 *Cornell L. Rev.* 448 (1969); Poe, "Capital Punishment Statutes In The Wake of United States v. Jackson: Some Unresolved Questions," 37 *Geo. Wash. L. Rev.* 719 (1969); "The Supreme Court, 1967 Term," 82 *Harv. L. Rev.* 63, 156 (1968); Comment, 41 *N.Y.U.L. Rev.* 612 (1969); Comment 47 *N.C. L. Rev.* 421 (1969); Note, "Discriminatory Sentencing and the Unitary Trial; Two Areas for Application of the United States v. Jackson Rationale," 31 *U. Pitt. L. Rev.* 118 (1969); Comment, 1969 *Wash. U. L. Q.* 231 (1969); Comment, 22 *Rutgers L. Rev.* 167 (1967).



The foregoing discussion serves not only to caution against an excessively broad reading of *Jackson* because of the threat to legitimate plea negotiations, but it also demonstrates compliance of the present sentencing scheme with the *Jackson* monition that encouragement of defendants not to contest their guilt not be "needless" or "unnecessary". 390 *U. S.* at 582, 583, 88 *S. Ct.* 1209. It has been amply demonstrated above that encouragement of guilty defendants not to contest their guilt is at the very heart of an effective plea negotiation program. While one can never be certain that all defendants so encouraged are in fact guilty, our practice on acceptance of guilty or *non vult* pleas requires that the judge satisfy himself by inquiry of the defendant and others that there is a factual basis for the plea. *R.* 3:9–2; *State v. Reali*, 26 *N.J.* 222 (1958). As well stated by the Chief Justice in *State v. Forcella, supra*, "[w]e should not deny a justified leniency for the many, merely to be positive that no man is needlessly encouraged not to defend." 52 *N.J.* at 276. The substantial benefits to the State as well as to the generality of criminal defendants, well summarized by the Supreme Court in the excerpt from *Brady*, quoted above, constitute a "need" for the encouragement of pleas of guilty within the requirement for such need laid down by *Jackson* (assuming that case survives as authority in respect of situations other than those involving the death penalty, which we strongly doubt [8]).

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[8] There is a clear implication in *Jackson* that once the death penalty was eliminated, a viable plea negotiation potential in the recast statute was thought desirable. Responding to a Government suggestion that the federal act could be sustained by judicial elimination of all guilty pleas and waivers, the Court noted that this would require full-dress jury trials in all cases, and, "apart from the cruel impact of such a requirement upon those defendants who would greatly prefer not to contest their guilt," would "rob the criminal process of much of its flexibility". 390 *U.S.* at 584, 88 *S. Ct.* at 1218.

Nothing said hereinabove loses force by virtue of the fact that in the sentencing scheme before us a life sentence is mandatory upon a conviction of first degree murder. The present litigation is not a seminar on the pros and cons of mandatory sentencing, and our decision here implies no view of sound penological policy in the matter.[9] From the constitutional standpoint we are considering, *i. e.*, the extent of permissible encouragement of guilty pleas, there can be no objection to mandatory sentencing for prescribed offenses on conviction after trial, this being a policy matter completely within legislative discretion. *State v. Hampton*, 61 *N.J.* 250, 273 (1972); *People v. Broadie*, 37 *N.Y.* 2d 100, 371 *N.Y.S.* 2d 471, 481, 332 *N.E.* 2d 338, 345 (Ct. App. 1975); *Commonwealth v. Jackson*, 344 *N.E.* 2d 166, 170 (Sup. Jud. Ct. Mass. 1976); *State ex rel. Moraites v. Gorman*, 322 *N.E.* 2d 319, 320–321 (Ct. App. Ohio 1974). So much granted, the ultimate inquiry devolves to whether the juxtaposition of a potential lesser sentence on a plea of *non vult* alongside the unexceptionable mandatory life sentence on a conviction condemns the statutory scheme as a needless encouragement of the surrender of the right to defend and therefore an impermissible impingement on defendants' Fifth Amendment rights. The considerations discussed above strongly argue to the contrary.

The risks attendant upon the choice a murder defendant must make under our murder statute as to whether to defend or plead guilty are comparable to those arising from many other kinds of decisions a criminal defendant must make in the course of a prosecution. See *Chaffin v. Slynchcombe*, 412 *U.S.* 17, 93 *S. Ct.* 1977, 36 *L. Ed.* 2d 714 (1973) (more onerous verdict by a jury on a retrial after successful appeal from original conviction); *Crampton v. Ohio*, reported *sub nom. McGautha v. California*, 402 *U.S.* 183, 91 *S. Ct.* 1454, 28 *L. Ed.* 2d 711 (1971) (dilemma of murder defendant as to whether to testify in single-trial procedure for assessment both of guilt and punishment); *Colten v. Kentucky*, 407 *U.S.* 104, 92 *S. Ct.* 1953, 32 *L. Ed.* 2d 584 (1972) (retrial *de novo* on appeal from inferior court with potential of greater punishment); *Brady v. United States, supra; McMann v. Richardson, supra* 397

[9] A "life sentence" is, for all practical purposes, a sentence for less than the natural life of the defendant.



*U.S.* 759, 90 *S. Ct.* 1441, 25 *L. Ed.* 2d 763 (choice between challenging coerced confession at trial and pleading guilty to assure lighter sentence). "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow". *McGautha v. California, supra* 402 *U.S.* at 213, 91 *S. Ct.* at 1470. The defendant in a criminal trial "is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction." *Williams v. Florida*, 399 *U.S.* 78, 83, 90 *S. Ct.* 1893, 1897, 26 *L. Ed.* 2d 446 (1970). If he testifies, he exposes himself to confrontation with prior criminal convictions. So too, when an accused presents witnesses at trial, he must reveal their identity and submit them to cross-examination, which, in itself, may prove incriminating or which may furnish the prosecution with strong rebuttal evidence. *Id.* at 83–84, 90 *S. Ct.* 1893. That the defendant faces such a dilemma "has never been thought an invasion" of his constitutional rights. *Id.* at 84, 90 *S. Ct.* 1897. In all such situations, as in many similar ones, the question is whether the inherent compulsion of the defendant to make a choice impairs any constitutioal right. *McGautha v. California, supra* 402 *U.S.* 213, 91 *S. Ct.* 1454. Unless the courts exercise considerable self-restraint in judging the validity of such constraints upon criminal defendants in our necessarily highly pragmatic criminal justice system, its effective operation could be intolerably prejudiced.

Finally, it is our considered view that *Jackson* today is authority only for a situation where a defendant faces the prospect of a possible death sentence if convicted as against the alternative of merely a prison term if he pleads guilty. We have hereinabove stressed the language of *Jackson* emphasizing the awful pressure exerted upon a defendant whose choice of a course of action may mean his death. At the time of *Jackson*, the Court was undoubtedly already sensitive to the considerations which were to lead to the later broad invalidation of death penalties in *Furman v. Georgia*, 408 *U.S.* 238, 92 *S. Ct.* 2726, 33 *L. Ed.* 2d 346 (1972). *Cf. Witherspoon v. Illinois, supra* 391 *U.S.* 510, 88 *S. Ct.* 1770, 20 *L. Ed.* 2d 776.

As noted by the dissenting Justices in *State v. Forcella, supra*, "*Jackson* was concerned solely with the grisly choice between a plea or waiver with an assurance of no death penalty, and a

jury trial with the danger of a death penalty". 52 *N.J.* at 301. They further pointed out that "the law has always been administered with pragmatic recognition of the fact that the differences between the death penalty and imprisonment entails more than matters of logic and degree". *Id.* at 300–301. In *Furman v. Georgia* it was stated by Justice Brennan, concurring, that "[t]he calculated killing of a human being by the State involves by its very nature, a denial of the executed person's humanity". 408 *U.S.* at 290, 92 *S. Ct.* at 2752. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two". *Woodson v. North Carolina*, 428 *U.S.* 280, 305, 96 *S. Ct.* 2978, 2992, 49 *L. Ed.* 2d 944, 961 (1976).

[2] We believe enough has been said to demonstrate that the same Court which decided both *Jackson* and *Brady* would not strike down as infringing upon Fifth Amendment rights a sentencing scheme providing for a disparity between a potential penalty upon a conviction and that upon a plea of guilty where the former was imprisonment rather than the death penalty.

In summary of the foregoing, we conclude: (1) the authority of *Jackson* is confined to the case of a choice between trial and plea of guilt when a possible consequence of the former, and only of the former, is the death penalty; (2) alternatively, if the authority of *Jackson* goes beyond situation (1), any encouragement or inducement of a defendant to plead *non vult* under our statute and thereby waive his right to trial is not the result of a needless or unnecessary procedural device but a highly useful and desirable one, and the encouragement is therefore not an impermissible infringement of defendant's Fifth Amendment rights.

## II

### *Alleged Denial of Equal Protection*

[3] Defendant contends that the sentencing scheme of *N.J.S.A.* 2A:113–3, 4 has the effect of separating persons who have committed felony murder into two classes—those who go to trial and those who plead *non vult*—and of treating the former class differently and discriminatorily as to punishment without a compelling state justification for the difference in treatment. This is urged to constitute an unconstitutional denial of equal protection of the laws.



The State first counters with two preliminary responses: (1) that those indictees who plead *non vult* are pleading to a different "crime" from that of which one is convicted where, after trial, the jury returns a verdict of first-degree murder; (2) that the statute does not create differently treated classes, but, rather, merely offers all such indictees a choice, and that it is the defendant who places himself in one "class" or the other based upon his choice. We regard the second response as more semantic than substantive, and pass it. The first response is that in legal contemplation the crime identified by a conviction of first degree murder is different from the undifferential crime of murder, as stated in the formal indictment, which will support convictions of first or second degree murder or manslaughter. See *State v. Sullivan*, 43 *N.J.* 209, 241–247 (1964). Therefore, goes the argument, acceptance of a *non vult* plea constitutes conviction of a different crime from first degree murder and may be treated differently.

We do not accept the latter position as a fully satisfactory basis for meeting the defendant's argument, which, it seems to us, can and should be dealt with more directly. We therefore pass to the State's defense of the statute on grounds more related to the merits of the equal protection attack.

[4] In the first place, we concur in the State's rejection of defendant's contention that the issue calls for application of the more exacting of the two tests for deciding an equal protection question—that of requiring the demonstration of a "compelling state interest" for the classification, as where "suspect" categories or "fundamental" rights are involved. See *Dunn v. Blumstein*, 405 *U.S.* 330, 342, 92 *S. Ct.* 995, 31 *L. Ed.* 2d 274 (1972); *Shapiro v. Thompson*, 394 *U.S.* 618, 634, 89 *S. Ct.* 1322, 22 *L. Ed.* 2d 600 (1969); *State v. Chambers*, 63 *N.J.* 287, 296 (1973); *State v. Costello*, 59 *N.J.* 334, 345–346 (1971) (both of the latter cases involving penological classification based on the suspect category of sex). In this State, however, where the Legislature has created classification of offenders for purposes of fixing penalty, the courts have contined (absent use of suspect criteria such as race or sex) to apply the traditional "rational relationship" test. *State v. Fearick*, 69 *N.J.* 32, 38 (1976); *State v. Smith*, 58 *N.J.* 202, 206–207 (1971). *State in Interest of K.V.N.*, 116 *N.J. Super.* 580, 589 (App. Div. 1971), aff'd o. b. 60 *N.J.* 517 (1972). These cases stand for the

proposition that in the area of classification of criminal or penal offenders for purposes of penalty or punishment the Legislature may provide for differences of treatment so long as there is some rational connection between the classification and a proper legislative purpose.

If, therefore, defendant is right in asserting that murder indictees who contest guilt by trial and are convicted of first degree murder and those whose *non vult* pleas are accepted by the court are constituted separate classes by the statute, the question as to whether that classification, in the light of the different minimum punishments prescribed for each class is valid, becomes an inquiry as to whether there is a proper legislative purpose to which the classification is rationally related. This inquiry, we are clear, must be resolved in the affirmative. There are several such purposes. The first is the humane and rehabilitative one of ameliorating the rigor of life imprisonment for those offenders who are willing to acknowledge their crime. *State v. Poteet*, 61 *N.J.* 493, 496 (1972); *State v. Forcella, supra* (52 *N.J.* at 275, 299–300). Other such purposes are fully developed in Part I of this opinion where they are cited to demonstrate that any encouragement in our statutory scheme to murder indictees to plead *non vult* is "needed" and not "unnecessary", within Fifth Amendment criteria and considerations. These purposes include the facilitation of plea negotiations in homicide cases, necessary to achieve flexibility and efficiency as well as justice in criminal justice administration; the conservation of scarce judicial and prosecutorial resources for those cases which properly require trial; and the prompter imposition of punishment on acknowledged offenders. See *Brady v. United States, supra* 397 *U.S.* at 752, 90 *S. Ct.* 1463.

[5] All of the foregoing presumptive legislative purposes are, to say the least, rationally connected with the difference in potential minimum penalties respectively imposable upon conviction of first degree murder and upon acceptance by the court of a *non vult* plea to a charge of murder.[10] That such purposes, arguably, could be served more wisely were there a more flexible range of punishments on conviction for first degree murder

[10] It might well be argued that such purposes even amount to a "compelling state need", were it legally necessary to meet that equal protection test.



than the life imprisonment now mandated is irrelevant, for equal protection purposes. The Legislature is not required to formulate the plan that seems most rational or sound to the court. It is sufficient if *any* rational basis relevant to a proper purpose underlies the classification and the attendant treatment of the classes affected. *State v. Smith*, 58 *N.J.* 202, 206–207 (1971); *State v. DeStasio*, 49 *N.J.* 247, 260 (1967), *cert.* den. 389 *U.S.* 830, 88 *S. Ct.* 96, 19 *L. Ed.* 2d 89 (1967); *State v. Wingler*, 25 *N.J.* 161, 175–176 (1957).

We conclude the equal protection attack upon the statutory scheme is without merit.

Judgment affirmed.

SULLIVAN, J. (dissenting). I find myself unable to agree with the reasoning and conclusion in the majority opinion. Plainly stated, the statutory sentencing scheme before us provides that if a defendant who is indicted for murder exercises his right to stand trial by jury and is convicted of murder in the first degree he must receive a sentence of life imprisonment. However, if he pleads *non vult* to the same indictment, he becomes eligible to receive a sentence for any term of years not exceeding 30 years and even have such sentence suspended. *N.J.S.A.* 2A:168–1.

The majority opinion states that the issue is whether this scheme results in the "needless encouragement" of guilty pleas. It is that in part, but of equal importance, here it penalized a defendant who exercised his right to stand trial. For that he had a mandatory sentence of life imprisonment imposed on him. I agree with the late Chief Justice Weintraub that such a sentencing scheme would and does present "a *Jackson*-type difficulty [1] in that one who stood trial would receive a life sentence for first-degree murder while a defendant whose *non vult* plea was accepted could receive a sentence for a term of years." *State v. Forcella*, 52 *N.J.* 263, 282 (1968).

Various alternatives would be constitutionally permissible. One would be to abolish the *non vult* plea to the indictment and instead provide that a defendant would not be permitted to plead guilty to murder in the first degree but only to second degree murder. Also, the mandatory sentence of life imprisonment for first degree murder could be changed so as to vest discretion in the sentencing judge. This latter solution would ap-

[1] *United States* v. *Jackson*, 390 *U.S.* 570, 88 *S. Ct.* 1209, 20 *L. Ed.* 2d 138 (1968).

pear to be the more desirable because mandatory sentences, while they have been held to pass constitutional muster, bar a sentencing judge from taking into account facts and circumstances which otherwise might properly be relevant in fixing sentence.

The majority opinion holds that the separate classification for sentencing purposes of those who plead *non vult* to murder and those who choose to stand trial has a rational purpose akin to our system of plea negotiations. I see a substantial difference. Plea negotiations as noted in the majority opinion legitimately take into account a guilty defendant's willingness to admit such guilt and thereby conserve judicial and prosecutorial resources. A sentencing judge, in his discretion, may take such a plea of guilt into consideration in fixing the degree of punishment. However, a sentencing scheme which presents the threat of penalizing a defendant because he pleads not guilty and demands a jury trial, but not the same thing.

I am concerned about a defendant who pleads *non vult* to an indictment for murder in order to avoid the risk of a mandatory life sentence if he stands trial. I am equally concerned about a defendant who exercises his constitutional right to stand trial on the same indictment and because he does so, as here, now faces a madatory life sentence. To me, in addition to presenting a *Jackson*-type difficulty, this involves a denial of equal protection of the laws.

I would invalidate the mandatory life sentence provision of the statute, vacate the life sentence imposed on defendant and remand the matter to the trial court for resentencing with the trial judge to exercise such discretion as the circumstances warrant.

PASHMAN, J., dissenting. The majority today holds that a defendant may be denied the opportunity to receive a reduced sentence *solely* because he exercised his constitutional right to have his guilt determined by a jury of his peers. It now holds that a person who stands trial and is convicted will receive a mandatory life sentence even though that same individual might have been eligible for a suspended sentence if he had admitted his guilt and waived his rights. I believe that this decision calls into question some of our most basic constitutional guarantees, including a person's right to a jury trial, *Duncan v. Louisiana*, 391 *U.S.* 145, 88 *S. Ct.* 1444, 20 *L. Ed.* 2d 491 (1968), to confront one's accusers, *Pointer v. Texas*, 380 *U.S.* 400, 85 *S. Ct.* 1065, 13 *L. Ed.* 2d 923 (1965), to present witnesses in one's defense, *Washington v. Texas*, 388 *U.S.* 14, 87 *S. Ct.* 1920, 18 *L. Ed.* 2d 1019 (1967), to remain silent, *Malloy v. Hogan*, 378 *U.S.* 1, 84 *S. Ct.* 1489, 12 *L. Ed.* 2d 653 (1964), and to be convicted by proof beyond a reasonable doubt, *In re Winship*, 397 *U.S.* 358, 90 *S. Ct.* 1068, 25 *L. Ed.* 2d 368 (1970). The price tag which today's decision places on the exercise of such rights stands in stark contrast to the protections which they have traditionally enjoyed. Accordingly, I respectfully dissent.



I

*A*

The statutory scheme which gives rise to today's decision makes sentencing of persons charged with murder depend upon whether or not they exercise their constitutional right to go to trial. The sentencing procedure provides that if a defendant who is indicted for murder exercises his right to go to trial and is convicted of murder in the first degree, he *must* receive life imprisonment. If he pleads *non vult* to the same indictment, he *may* receive a suspended sentence or any term not exceeding 30 years. *State v. Funicello*, 60 *N.J.* 60, 68 (1972).

This unfair result contradicts the numerous cases holding that the sentence imposed on a criminal defendant may not depend upon whether he has exercised his right to trial. *United States v. Jackson*, 390 *U.S.* 570, 88 *S. Ct.* 1209, 20 *L. Ed.* 2d 138 (1968); *Pope v. United States*, 392 *U.S.* 651, 88 *S. Ct.* 2145, 20 *L. Ed.* 2d 1317 (1968); *United States v. Derrick*, 519 *F.* 2d 1, 3 (6 Cir. 1975) ("it is improper for a district judge to penalize a defendant for exercising his constitutional right to plead not guilty and go to trial, no matter how overwhelming the evidence of his guilt"); *Voyles v. Thorneycroft*, 398 *F. Supp.* 706 (D. Ariz. 1975); *People v. Young*, 20 *Ill., App.* 3d 891, 314 *N.E.* 2d 280 (1974). In *Hess v. United States*, 496 *F.* 2d 936 (8 Cir. 1974), the Eighth Circuit noted that it was joining "a host of other courts in recognizing that whether a defendant exercises his constitutional right to trial by jury to determine his guilt or innocence must have no bearing on the sentence imposed," 496 *F.* 2d at 938, citing in support of this proposition: *United States v. Marzelle*, 485 *F.* 2d 207 (8 Cir. 1973); *United States v.*

*Stockwell*, 472 F. 2d. 1186 (9 Cir.), *cert.* den. 411 *U.S.* 948, 93 *S. Ct.* 1924, 36 *L. Ed.* 2d 409 (1973); *United States v. Hopkins*, 150 *U.S. App. D.C.* 307, 464 *F.* 2d 816, 822 (1972); *Scott v. United States*, 135 *U.S. App. D.C.* 377, 419, *F.* 2d 264, 269–74 (1969); *Baker v. United States*, 412 *F.* 2d 1069, 1073 (5 Cir. 1969), *cert.* den. 396 396 *U.S.* 1018, 90 *S. Ct.* 583, 24 *L. Ed.* 2d 509 (1970); *United States v. Wiley*, 278 *F.* 2d 500, 504 (7 Cir. 1960).[1]

In *United States v. Jackson, supra,* the United States Supreme Court considered a sentencing scheme similar to the instant one, although admittedly under it the potential consequences of asserting one's right to trial were substantially more severe. The challenged statute, 18 *U.S.C.* § 1201(a), permitted a defendant to be sentenced to the death penalty only upon a jury recommendation of that sanction. Thus, the death penalty could only be imposed where the defendant pleaded not guilty and unsuccessfully exercised his right to a trial. In holding the statute unconstitutional, the Court clearly indicated that *any* statute which operates to chill the exercise of a defendant's constitutional rights must be invalidated. Mr. Justice Stewart wrote for the Court:

> Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. *If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.* [390 *U.S.* at 581, 88 *S. Ct.* at 1216, 20 *L. Ed.* 2d at 147; footnote omitted, emphasis added.]

[1] This principle is not foreign to our own Court. The statement was made in *State v. De Stasio*, 49 *N.J.* 247, 259 (1967), *cert.* den. 389 *U.S.* 830, 88 *S. Ct.* 96, 19 *L. Ed.* 2d 89 (1967), that "a sentence may not be increased because a defendant defended against the charge. * * *" It was also repeated approvingly in *State v. Gibson*, 68 *N.J.* 499, 510 (1975) and *State v. Poteet*, 61 *N.J.* 493, 496 (1972), *habeas corpus* granted *sub. nom. Poteet v. Fauver*, 517 *F.* 2d 393 (3 Cir. 1975).



Contrary to the notion of today's majority, the Supreme Court's decision was not grounded on the theory that a defendant's rights were "chilled" only in a situation where a conviction by a jury resulted in the mandatory imposition of a more severe penalty than that which could have been imposed upon a plea. The statute involved in *Jackson*, as well as those in *Pope v. United States, supra,* and *Funicello v. New Jersey*, 403 *U.S.* 948, 91 *S. Ct.* 2278, 29 *L. Ed.* 2d 859 (1971), made it possible for a defendant who had been convicted by a jury to receive precisely the same lesser sentence which could have been imposed had he pleaded *guilty*. Unlike the situation presented in this case with respect to life imprisonment, the death penalty was not the mandatory sentence upon such conviction. Rather, it is obvious that the Court felt that the *mere possibility* of a more severe sentence resulting from a jury trial chilled a defendant's exercise of his constitutional rights.

*B*

The majority, however, argues that the Court's opinion in *Jackson* is distinguishable for two reasons: (1) the possibility of the death sentence in that case was far more coercive than the threat of life imprisonment involved here, and (2) there the defendant could have received a more severe sentence by going to trial while here he is merely eligible to receive a less severe sentence if he pleads *non vult*. See *ante* at 389–391. Despite the acknowledgement that express language in *Jackson* seems to contradict either attempt at distinguishing the present scheme, the majority apparently embraces the first rationale as a means of circumventing the *Jackson* result. *Id.* at 391, quoting with approval, *State v. Forcella*, 52 N.J. 263, 300–01 (1968) (Jacobs, Hall, J.J., dissenting). See also *ante* at 399.

This emphasis on the fact that *Jackson* involved a sentencing scheme utilizing the death penalty is the basis of the majority's untenable assertion that a statute must actually *coerce* a defendant into pleading guilty to be constitutionally defective.

Yet as the majority itself recognizes, see *ante* at 390, the Court's opinion in *Jackson* specifically noted that such coercion was not a necessary element of an impermissible chilling of a defendant's exercise of his constitutional rights. The court reasoned that

> the evil in the federal statute is not necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. [390 *U.S.* at 583, 88 *S. Ct.* at 1217, 20 *L. Ed.* at 148; emphasis in original.]

Elsewhere in the opinion the Court stated that "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." 390 *U.S.* at 583, 88 *S. Ct.* at 1217, 20 *L. Ed.* 2d at 147.

Additional light is shed on the Court's meaning in using the phrases "needlessly encourages" or "penalizes the assertion of a constitutional right" by reference to *Griffin v. California*, 380 *U.S.* 609, 85 *S. Ct.* 1229, 14 *L. Ed.* 2d 106 (1965). The Court there held that allowing critical comment at trial concerning the accused's failure to take the stand in his own defense violated the Fifth Amendment privilege against self-incrimination. In language similar to that used in *Jackson*, the Court ruled that such conduct amounted to "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 *U.S.* at 614, 85 *S. Ct.* at 1232, 14 *L. Ed.* 2d at 109–10.

Hence, it is incontrovertible that *Jackson* and *Griffin* prohibit *any* governmental action which "needlessly encourages" a defendant's waiver of his constitutional rights or makes the assertion of those rights more "costly." *Griffin* precludes any argument that such an illegal "encouragement" comes only from the threat of the death penalty,[2] or that the constitutional

[2] In *United States* v. *McCoy*, 130 *U.S. App. D.C.* 60, 429 *F.* 2d 730 (1970) the Court applied the *Jackson* principle to a penalty of life imprisonment. At sentencing, the trial judge had informed the defendant that "anyone else who was convicted by a jury before me of Armed Robbery would receive a life sentence." 139 *U.S. App. D.C.* at 64, 429 *F.* 2d at 743. Although reversing the conviction on other grounds, the Court noted that despite



infirmity would be cured if the "penalty" for going to trial could also be imposed upon a plea of *non vult*.[3]

Nor are *Jackson* and *Griffin* aberrations. They are wholly consistent with a line of authority holding that government may not unduly burden the exercise of constitutional rights. This same rationale was expressed by the Court in *Malloy v. Hogan, supra,* the seminal decision holding that the Fifth Amendment privilege against self-incrimination was applicable to the States through the Fourteenth Amendment. Mr. Justice Brennan, speaking for the Court, concluded that the privilege secures "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 *U.S.* at 8, 84 *S. Ct.* at 1493, 12 *L. Ed.* 2d at 659. The Court's opinion reinforces the theme enunciated in *Jackson*—that any needless encouragement to waive one's constitutional rights is tantamount to unconstitutional penalty:

> Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * *" * * * In other words

the defendant's lack of awareness of this judicial policy when he elected to exercise his right to trial,

> '[the] inevitable effect of any such provision is * * * to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.' *United States* v. *Jackson*, 390 *U.S.* 570, 581, 88 *S. Ct.* 1209, 1216, *L. Ed.* 2d 138 (1968). (Footnote omitted.) [*Id.* at 743.]

[3] The majority concludes that *Jackson* emphasized the fact that the only way to avoid the "penalty" was by waiving one's right to go to trial. See *ante* at 388. Thus, it would hold that since a defendant may receive a life sentence under the present scheme, whether or not he goes to trial, there is no constitutional impediment. However, this reasoning substitutes for the Supreme Court's clear-cut test—whether or not the scheme "needlessly encourages" guilty pleas—a new hyper-technical distinction. As I have already stated, under several statutes which the Supreme Court struck down, a defendant could receive the same sentence whether or not he pleaded guilty. I see no reason to conclude that the instant statute is any less of an encouragement to plead *non vult* than any of those. *See United States* v. *McCoy, supra.*

> the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed, *Haynes v. Washington*, 373 *U.S.* 503, 83 *S. Ct.* 1336, 10 *L. Ed.* 2d 513 [378 *U.S.* at 7, 84 *S. Ct.* at 1403, 12 *L. Ed.* 2d at 659; citations omitted.]

Other decisions cited by the Court in *Malloy, supra,* support this same unswerving tradition of rigorously assuring that a person's waiver of his constitutional rights is not tainted by governmental misconduct. *But see Smith v. United States*, 348 *U.S.* 147, 150, 75 *S. Ct.* 194, 99 *L. Ed.* 192, 197 (1954); *Ziang Sung Wan v. United States*, 266 *U.S.* 1, 14, 45 *S. Ct.* 1, 69 *L. Ed.* 131, 148 (1924); *Hardy v. United States*, 186 *U.S.* 224, 229 , 22 *S. Ct.* 889, 46 *L. Ed.* 1137, 1140 (1907); *Bram v. United States*, 168 *U.S.* 532, 542–43, 18 *S. Ct.* 183, 42 *L. Ed.* 568, 573 (1897).

*C*

The only question then is whether the governmental action in the present case "needlessly encourages" a defendant to waive his constitutional rights or makes the assertion of those rights more "costly." Clearly, this question must be answered in the affirmative, particularly when the present statutory scheme is measured against the evil perceived in *Griffin* or *Haynes v. Washington, supra.* Surely the threat here—the heightened possibility of a sentence of life imprisonment after trial—would have a far greater effect on a defendant's decision to waive his rights than either the possibility that a prosecutor will comment adversely on an accused's failure to testify at trial, as in *Griffin,* or the refusal to allow a person to speak with his wife until he confessed, as in *Haynes.*

The present statute is quite similar to the situation addressed by the Court in *Scott v. United States, supra.* The trial judge had told the defendant there that "[i]f you had pleaded guilty to this offense, I might have been more lenient with you." On appeal, Judge Bazelon concluded that "[t]he stark import of this comment [was] that the defendant paid a price for demanding a trial." 135 *U.S. App. D.C.* at 382, 419 *F.* 2d at 269 [footnotes omitted]. After observing that the United States Supreme Court had held that the assertion of Fourth, Fifth



and Sixth Amendment rights may not be made more costly by a differential sentencing policy which "exact[s] a price from those who insist upon a trial," he concluded that such an announced policy taints sentencing with impermissible considerations which make a defendant a "pawn sacrificed to induce other defendants to plead guilty." 135 *U.S. App. D.C.* at 383, 385, 419 *F.* 2d at 270, 272. *See also United States v. McCoy, supra* at 743.

The present statute burdens the exercise of a defendant's rights even more onerously. By formalizing in a statute the disparity between sentences for pleas of not guilty and *non vult,* the State heightens the possibility that a defendant will be induced to plead to a charge.

*D*

I find little to persuade me of the merit of the majority's position in the three cases which it cites: *North Carolina v. Alford*, 400 *U.S.* 25, 91 *S. Ct.* 160, 27 *L. Ed.* 2d 162 (1970); *Brady v. United States*, 397 *U.S.* 742, 90 *S. Ct.* 1463, 25 *L. Ed.* 2d 747 (1970); *Parker v. North Carolina*, 397 *U.S.* 790, 90 *S. Ct.* 1458, 25 *L. Ed.* 2d 785 (1970). These cases addressed only the issue of permissible grounds for withdrawal of a guilty plea which was obtained under an unconstitutional scheme. They are of little help in determining whether a statutory scheme itself is constitutional.

Contrary to the majority's assumption, these cases do not represent an erosion of the *Jackson* principle. The basis for the Supreme Court's opinions in the three cases was foreshadowed in *Jackson* when the Court stated that

> the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. [300 *U.S.* at 583, 88 *S. Ct.* at 1217, 20 *L. Ed.* 2d at 148; footnote omitted.]

Thus, the Court was able to say in *Brady v. United States, supra,* that *Jackson*

> neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reit-

> erated that guilty pleas are valid if both "voluntary" and "intelligent." [397 *U.S.* at 747, 90 *S. Ct.* at 1468, 25 *L. Ed.* 2d at 756.]

In a footnote the Court added that "[t]he requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized." *Id.*, n. 4. Hence, I do not regard these largely irrelevant cases as an endorsement of our current sentencing plan. They are solely concerned with the standard to be applied when a defendant seeks to withdraw a guilty plea. The Supreme Court has indicated that a more stringent burden applies in the latter situation than when attacking the constitutionality of a sentence. Such a result is in keeping with the extreme importance which the Court has consistently placed on the finality of a plea. *See McMann v. Richardson*, 397 *U.S.* 759, 774, 90 *S. Ct.* 1441, 1450, 25 *L. Ed.* 2d 763, 775 (1970) (decided the same day as *Brady* and *Parker v. North Carolina*) ("interests in maintaining the finality of guilty plea convictions" warrant judging plea under law existing when plea given); *Tollett v. Henderson*, 411 *U.S.* 258, 93 *S. Ct.* 1602, 36 *L. Ed.* 2d 235 (1973) (guilty plea may not be withdrawn although given following an indictment by an unconstitutionally selected grand jury).

Notwithstanding the inapposition of these cases, the majority goes beyond the strict holdings in *North Carolina v. Alford*, *Brady* and *Parker v. North Carolina* and finds comfort in *dicta* in those cases referring to the propriety of plea negotiations or bargaining. Equating the present sentencing arrangement with other choices a defendant must make in the course of a trial, it concludes that the "needless encouragement" referred to in *Jackson* only applies to a situation in which the death penalty is involved. See *ante* at 397.

Contrary to the conclusion which the majority derives from the dicta in this trilogy of cases, I regard their language to be relevant only insofar as it confirms an otherwise obvious conclusion: that inducements which are implicit in the criminal justice system itself provide an insufficient basis for prohibiting guilty pleas in general. Thus, it would be frivolous for a defendant to attempt to withdraw a guilty plea because he was induced to admit his guilt by a desire to appease his conscience, or spare his family the anguish or expense of enduring a trial, or even to convince the sentencing judge that his admission of culpability was indicative of his capacity for being reformed. However, I



regard the considerations which must inevitably weigh upon a defendant's mind under the present sentencing scheme as being fundamentally distinguishable. The heightened possibility of a life sentence exerts a more conceive pressure on a person's mind that any of the other "inducements" mentioned by the majority. Furthermore, it can in no way be considered necessarily incidental to our system of justice.

I consider plea bargaining to involve entirely distinguishable considerations. Although both the Court's interpretation of the present statute and a plea bargain involve an inducement in that a defendant can receive a lesser sentence, only the former contemplates imposing a penalty for failing to plead guilty. For instance, it is settled that the State could not induce a plea by threatening that the sentencing judge would decline to consider mitigating circumstances if the defendant refuses to accept a bargain. *See generally Santobello v. New York*, 401 *U.S.* 257, 265–66, 92 *S. Ct.* 495, 30 *L. Ed.* 2d 427, 434–35 (Douglas, J., concurring) (1971); Scott v. *United States, supra*, 135 *U.S. App. D.C.* at 387, 419 *F.* 2d at 274 (court may not "create incentives for guilty pleas [in the bargaining process] by a policy of differential sentences"). Furthermore, where a person rejects a bargain, the State may not use that fact as a ground for preventing him from exercising the right to appeal his sentence on the ground that it was excessive. *Cf. State v. Gibson, supra.* Yet these are precisely the type of penalties which today's result mandates.[4]

---

[4] One commentary has noted that—

> courts appear to make the distinction that a defendant cannot be *forced to pay* for exercising a constitutionally granted right, yet he cannot be heard to complain if he voluntarily *receives* a concession for waiving the right. If the accused is exposed to a greater risk for asserting a right, then he is being encouraged not to exercise his legal and constitutional prerogatives and is possibly deprived of the ability to freely weigh the alternatives. Nevertheless, the decision to plead guilty to a lesser sentence and avoid the risk of either a conviction on more serious charges or a more severe sentence is held voluntary. [Note, "The Legitimation of Plea Bargaining: Remedies for Broken Promises," 11 *The American Criminal Law Review* 771, 777 (1973); footnotes omitted; emphasis in original]

It then went on to apply this reasoning, concluding that this distinction explains the "contrasting judicial treatment of differential sentencing and plea bargaining. Differential sentencing is generally unacceptable; any announced judicial policy whereby a defendant who is convicted by trial will be sentenced more harshly than if he pleads guilty, is a denial of due process of law." *Id.*

Moreover, it is doubtful whether a court would ever accept a plea bargain under the circumstances created by this scheme. As Mr. Justice Mountain stated in *State v. Thomas*, 61 *N.J.* 314 (1972), "[i]f plea bargaining is to fulfill its intended purpose, it must be conducted fairly on both sides and the results must not disappoint the reasonable expectations of either." 61 *N.J.* at 321. The necessary corollary of such a holding is that a bargain may be enforced only if the defendant is "fully aware of the direct consequences [of his plea], including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, * * *." *Brady v. United States, supra*, 397 *U.S.* at 756, 90 *S. Ct.* at 1472, 25 *L. Ed.* 2d at 760, quoting approvingly from *Shelton v. United States*, 246 *F.* 2d 571, 572, n. 2 (5 Cir. 1957) (*en banc*), rev'd on confession of error on other grounds, 356 *U.S.* 26, 78 *S. Ct.* 563, 2 *L. Ed.* 2d 579 (1958). *See also State v. Gibson, supra*, 68 *N.J.* at 518 (Schreiber, J., concurring). Under today's holding a defendant who pleads *non vult* to avoid running the risk of a conviction after trial is not only deprived of the benefit of a reduction in charges, but is told only that he will receive a sentence varying anywhere from probation to life imprisonment. While such a defendant knows that the sentencing judge is now in a position to consider mitigating factors, he cannot be assured of the result of his plea or even of the weight which will be accorded those factors. A defendant in this uncertain position cannot be said to be "fully aware of the direct consequences of his plea." In fact, contrary to the theory that the sentence in this case can be upheld on the basis of an analogy to plea bargaining, this state of affairs typifies the "pleading in the dark" which has led various courts to place stricter limits on the bargaining process.[5] *See* Gallagher, "Judicial Participation in Plea Bargaining: A Search for New Standards," 9 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 29, 33 (1974).

I believe that plea bargains serve certain legitimate functions which distinguish them from sentencing under the scheme in question. Such negotiations allow a prosecutor to offer leniency in exchange for assistance or testimony which is necessary in

[5] Any such holding would render ludicrous the corollary requirement that the terms of a bargain be carried out. *Santobello* v. *New York, supra; State* v. *Brown*, 71 *N.J.* 578 (1976); *State* v. *Jones*, 66 N.J. 524, 525–26 (1975).



other cases. *State* v. *Taylor*, 49 N.J. 440, 455 (1967), and enable him to fully carry out the charging function vested in his office. *Cf. State* v. *Leonardis*, 73 N.J. 360, 379, n. 9 (1977). On the other hand, the statute in question appears to have the single purpose of encouraging people to plead *non vult*. Such a purpose is impermissible under our Constitution, and I would thus hold that this scheme is unconstitutional. I believe that we are bound in this regard by the United States Supreme Court's mandate in *Jackson* that if a "provision [has] no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." 390 U.S. at 581, 88 S. Ct. at 1216, 20 L. Ed. 2d at 147.

II

My conclusion that this scheme has only one purpose—to chill the assertion of an accused's constitutional rights—impels me to conclude that it is also violative of defendant's right to equal protection of the laws under the Fourteenth Amendment. Even if the majority is correct in assuming that a sentencing scheme which provides for disparate sentencing may be upheld merely upon a showing of its rational relationship to some legitimate state object,[6] I fail to see any legitimate state purpose served by this plan.

The requirement that any legislative enactment must serve some legitimate state objective has been stated throughout the opinions of this Court and the United States Supreme Court. *See, e. g., Dunn v. Blumstein*, 405 *U.S.* 330, 92 *S. Ct.* 995, 31 *L. Ed.* 2d 274 (1972); *Lindsey v. Normel*, 405 *U.S.* 56, 70, 92 *S. Ct.* 862, 31 *L. Ed.* 2d 36, 48 (1972); *State v. Fearick*, 69 *N.J.* 32, 38 (1976); *State v. Smith*, 58 *N.J.* 202, 207 (1971).

[6] Recently this Court held that a scheme which results in disparate sentencing is inherently suspect and must be supported by a compelling state interest. Mr. Justice Sullivan wrote for a unanimous Court in *State* v. *Chambers*, 63 N.J. 287 (1973):

> Generally, legislative selection of a class for special treatment can be justified where there is some rational basis between the classification and the object sought to be achieved. However, certain classifications by their very nature are inherently suspect and will be subjected to close judicial scrutiny as to whether a fundamental constitutional right is being impaired. * * * [63 *N.J.* at 295–96.]

The first reason propounded by the majority for upholding the present scheme is, in its words, the

> humane and rehabilitative one of ameliorating the rigor of life imprisonment for those offenders who are willing to acknowledge their crime. [Ante at 402.]

Such an exercise in circular logic tells us nothing. If the sole reason for offering a reduced sentence is that it serves humanitarian and rehabilitative functions, there is no reason why these same goals would not apply with equal force to defendants who choose, as they are constitutionally entitled, to have their guilt determined by a judge and jury. As eloquently stated by Judge Bazelon in *Scott, supra*:

> Repentance has a role in penology. But the premise of our criminal jurisprudence has always been that the time for repentance comes after trial. The adversary process is a fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society.
>
> There is a tension between the right of the accused to assert his innocence and the interest of society in his repentance. But we could consider resolving this conflict in favor of the latter interest only if the trial offered an unparalleled opportunity to test the repentance of the accused. It does not. There is other, and better, evidence of such repentance. The sort of information collected in presentence reports provides a far more finely brushed portrait of the man than do a few hours or days at trial. And the offender while on probation or in prison after trial can demonstrate his insight into his problems far better than at trial.
>
> In striking down a disparate sentencing scheme based solely upon sex, the Court noted that it was concerned in that case with "confinement in a penal institution—a restraint on one's liberty, one of the most basic human rights." *Id.*
>
> If the defendant were unaware that a proper display of remorse might affect his sentence, his willingness to admit the crime might offer the sentencing judge some guidance. But with the inducement of a lighter sentence dangled before him, the sincerity of any cries of *mea culpa* becomes questionable. Moreover, the refusal of a defendant to plead guilty is not necessarily indicative of a lack of repentance. A man may regret his crime but wish desperately to avoid the stigma of a criminal conviction [135 *U.S. App. D.C.* at 383, 384, 410 F. 2d at 270–1; footnote omitted.]



The second reason offered by the majority for upholding the scheme is its asserted promotion of "flexibility and efficiency as well as justice in criminal justice administration." The third reason is simply a restatement of this: the conservation of "scarce judicial and prosecutorial resources for those cases which properly require trial." Taken together, these statements may be read to mean that our basic constitutional rights are not worth the time that we spend on them, and that a case is not really worth trying unless a defendant is willing to test his innocence against the possibility of a stiffer sentence if he is found guilty. Using the risk of life imprisonment as an incentive to ensure a vigorous trial contest seems unduly harsh at best and rather atavistic at worst. I can only conclude that the goals cited in support of the sentencing scheme fail to provide a legitimate state objective. They merely provide a pretext for further eroding our constitutional guarantees, an end which I regard as wholly illegitimate.

The final justification which the majority offers in support of the scheme is that it results in "prompter imposition of punishment on acknowledged offenders." Yet the folly in this bit of logic is that by upholding the scheme, we risk coercing a person into becoming an "acknowledged offender." While I am certainly in favor of reducing delays in our criminal justice system, I do not believe that we have a legitimate interest in discouraging persons from going to trial in order to be able to impose punishment more quickly.

## III

In spite of our long held beliefs that the constitutional guarantees associated with the right to a trial were available to *all* persons, we are now told that only those who are confident of victory should dare assert that right by going to trial. The possibility of a mandatory life sentence, with no hope for relief on

appeal, will surely sober any defendant who naively believes, as a result of a fair reading of the Bill of Rights, that he was free to exercise unfettered discretion in determining whether to demand that the State prove his guilt before a judge and jury.

This unfortunate result conflicts with an unbroken line of cases by the United States Supreme Court striking down governmental attempts to induce a person to waive his rights. In one stroke of the judicial pen the majority emasculates that Court's decisions in *Jackson* and *Griffin*, and undermines the firm foundation upon which those holdings rested. Thus I regard today's decision as a significant break with precedents of the Supreme Court setting forth minimum standards for protecting the important constitutional guarantees involved in this decision.

Finally, I note that the constitutional safeguards involved in this case—the right to a jury of one's peers, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to have the State prove one's guilt beyond a reasonable doubt—are the virtual touchstones of the American criminal trial. By discouraging defendants from availing themselves of the protections which our Constitution offers, we undermine the basic values which form the core of our democratic system.

I respectfully dissent. The life sentence imposed on the defendant should be vacated. I would remand to the trial court for resentencing in accordance with this opinion.

*For affirmance*—Chief Justice HUGHES, Justices MOUNTAIN, CLIFFORD and SCHREIBER and Judge CONFORD—5.

*For remandment*—Justices SULLIVAN and PASHMAN—2.

Supreme Court of New Jersey
(Docket No. A–98–76)

MCARTHUR CORBITT, APPELLANT

*v.*

STATE OF NEW JERSEY, APPELLEE

*Notice of Appeal to the Supreme Court of the United States—Filed Nov. 30, 1977*

Notice is hereby given that McArthur Corbitt, the appellant abovenamed, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of New Jersey, affirming the judgment of conviction, entered herein on October 6, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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(51)

Supreme Court of the United States

(No. 77–5903)

MCARTHUR CORBITT, APPELLANT

*v.*

NEW JERSEY

On consideration of the motion of the appellant for leave to proceed herein *in forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

February 21, 1978.



Supreme Court of the United States

(No. 77–5903)

MCARTHUR CORBITT, APPELLANT

*v.*

NEW JERSEY

Appeal from the Supreme Court of New Jersey.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 21, 1978.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-5903**

McARTHUR CORBITT,

*Appellant,*

*v.*

THE STATE OF NEW JERSEY,

*Appellee.*

**On Appeal from the Supreme Court of New Jersey**

## MOTION TO DISMISS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-5903**

McARTHUR CORBITT,

*Appellant,*

*v.*

THE STATE OF NEW JERSEY,

*Appellee.*

**On Appeal from the Supreme Court of New Jersey**

## MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## I.

## The state statute involved and the nature of the case.

### A. The Statute

This matter involves the constitutionality of the sentencing scheme of the New Jersey murder statutes, N.J.S.A. 2A:113-1, 2, 3, and 4, as judicially altered in *State* v. *Funicello,* 60 N.J. 60, 286 A.2d 55 (1972), *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972). As modified by the New Jersey Supreme Court, N.J.S.A. 2A:113-3 now provides that no plea of guilty shall be received upon any indictment for murder. If such a plea is offered, it must be disregarded, a plea of not guilty must be entered, and a jury duly impaneled must try the case. The statute permits, however, the accused to plead *non vult* or *nolo contendere* to the indictment. Upon such a plea, the sentence to be imposed is either life imprisonment or, in the alternative, the same as that imposed upon a conviction of second degree murder.

N.J.S.A. 2A:113-4 provides that every person convicted of first degree murder shall be sentenced to life imprisonment.[1] Upon a conviction of second degree murder, an accused is to be imprisoned for a maximum of thirty years. Thus, one convicted of first degree murder by a jury must receive a life sentence while one pleading *non vult* or *nolo contendere may* receive a sentence having a maximum of thirty years or life imprisonment.

[1] Prior to *Funicello* v. *New Jersey,* 403 U.S. 948 (1971), and *State* v. *Funicello, supra,* 60 N.J. 60 (1972), a jury conviction of first degree murder mandated the imposition of the death penalty unless the jury recommended life imprisonment.



### B. The proceedings below

The appellant, McArthur Corbitt, was convicted by a jury on April 10, 1973, of felony murder pursuant to N.J.S.A. 2A:113-1. On May 16, 1973, the mandatory sentence of life imprisonment was imposed. A Notice of Appeal to the Superior Court of New Jersey, Appellate Division, was filed on July 31, 1973.

On September 23, 1975, the Superior Court, Appellate Division, affirmed the conviction of felony-murder. A subsequent Petition for Certification to the Appellate Division was filed in the New Jersey Supreme Court and was granted on February 18, 1976. The certification was "limited to the question of the validity of the mandatory life sentence upon a jury conviction for murder. . . ."

The appellant argued before the New Jersey Supreme Court that the sentencing scheme of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 infringed upon his Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial, and deprived him of equal protection under the Fourteenth Amendment. The New Jersey Supreme Court found the sentencing scheme to be constitutional and affirmed the conviction. *State* v. *McArthur Corbitt,* 74 N.J. 379, 378 A.2d 235 (1977). A Notice of Appeal to this Court was filed in the New Jersey Supreme Court on November 30, 1977.

## II.

**The case presents no substantial question not previously decided by this Court.**

**A. The sentencing provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 do not place an unconstitutional burden upon a defendant's right to contest his guilt before a jury.**

The Appellant, McArthur Corbitt, was convicted by a jury of felony-murder. Consequently, the trial court imposed the mandatory sentence of life imprisonment. See N.J.S.A. 2A:113-4; *State* v. *Funicello,* 60 N.J. 60, 286 A.2d 55, *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972); *State* v. *Robinson,* 139 N.J. Super. 58, 352 A.2d 587 (App. Div. 1975). Had he chosen to plead *non vult* to the indictment, and had the court accepted the plea, he clearly would have been eligible for a less harsh sentence. See N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4. Although after pleading *non vult* a defendant may be sentenced to life imprisonment, the New Jersey Statutes specifically authorize the trial court to impose a lesser sentence not to exceed thirty years. At issue is whether the possibility of receiving a "lesser term" by entering a plea of *non vult* unnecessarily exacts a penalty with regard to an accused's assertion of his Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.

It is the position of the State of New Jersey that the sentencing scheme of its murder statutes does not needlessly chill assertion of those rights guaranteed by the Fifth and Sixth Amendments, nor does it penalize those who elect to contest their guilt before a jury. The penalty of life imprisonment is not contingent upon an accused's decision to defend against the charges which have been brought. Similarly, a plea of *non vult* does not assure a



lesser sentence than that mandated following a conviction of first degree murder by a jury. Hence, the statutes impose no burden on the exercise of an accused's constitutional rights.

Even if it is assumed that a burden is imposed, it can hardly be said that a defendant is "needlessly" penalized by virtue of his election not to plead *non vult.* In short, such a burden, if one exists, is inconsequential and, in any event, is reasonably related to a proper governmental goal. While it is true that no man should be subject to an enhanced penalty because he defends against a charge, it does not follow that an accused who frankly acknowledges his guilt should not be given consideration on that account. The concept that one who confesses is a better prospect for rehabilitation has long been accepted by our courts. Further, one who candidly admits his guilt should not, by virtue of that fact be denied leniency. So called "plea bargaining," which in part is premised upon the idea that a defendant who confesses is entitled to some degree of compassion, has respectable support in New Jersey and throughout the country. It would be specious to contend that the Fifth Amendment bars a potentially less severe punishment upon an admission of guilt. We submit that the New Jersey murder statutes do not infringe upon an accused's Fifth and Sixth Amendment rights and do not "needlessly" and "unnecessarily" penalize those who elect to proceed to trial and to assert their innocence of the crime charged.

***1. No penalty is imposed upon one who chooses to defend against a murder charge.***

It is well established that the State may not exact an unnecessary price for the assertion of a constitutional right. See *e.g., United States* v. *Jackson,* 390 U.S. 570

(1968), *cf. Lefkowitz* v. *Turley,* 414 U.S. 70 (1973); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Uniform Sanitation Men* v. *Sanitation Comm'r.,* 392 U.S. 280 (1968); *Spevack* v. *Klein,* 385 U.S. 511, 515 (1967); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Griffin* v. *California,* 380 U.S. 609 (1965). See also Note, "Another Look at Unconstitutional Conditions," 117 U.Pa.L.Rev. 144 (1968). Thus, this Court has held that statements obtained during the course of disciplinary investigations under the threat of dismissal from public office cannot be used as evidence in a subsequent criminal prosecution. See, *e.g., Garrity* v. *New Jersey, supra.* So too, statutes voiding public contracts entered into by one who has asserted the Fifth Amendment privilege against self-incrimination have been held to be constitutionally infirm. *Lefkowitz* v. *Turley, supra.* In a similar vein, this Court has condemned the practice of mandatorily disbarring attorneys based upon their exercise of the Fifth Amendment right to remain silent. *Spevack* v. *Klein, supra.* In these and in other contexts, it was held that the law may not place a premium on the assertion of a valued constitutional right. See *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Malloy* v. *Hogan,* 378 U.S. 1 (1964); *United States* v. *Derrick,* 519 F.2d 1 (6 Cir. 1975); *Hess* v. *United States,* 496 F.2d 936 (8 Cir. 1974).

This much conceded, it is equally clear that our Constitution does not serve to insulate those accused of criminal conduct from the necessity of making delicate choices. See, *e.g., Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973); *McGautha* v. *California,* 402 U.S. 183 (1971); *Brady* v. *United States,* 397 U.S. 742 (1970); *McMann* v. *Richardson,* 397 U.S. 759 (1970). *Cf. Colten* v. *Kentucky,* 407 U.S. 104 (1972). The criminal process, like the rest of the legal system, "is replete with situations requiring the making of difficult judgments as to which course to follow." *McGautha* v. *California, supra* at 213. The defendant in a criminal trial "is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction." *Williams* v. *Florida,* 399 U.S. 78, 83 (1970). So too, when an accused presents witnesses at trial, he must reveal their identity and submit them to cross-examination which, in itself, may prove incriminating or may furnish the prosecution with strong rebuttal evidence. *Id.* at 83-84. That the defendant faces such a dilemma "has never been thought an invasion" of his constitutional rights. *Id.* at 84; *State* v. *Corbitt,* 74 N.J. 379, 398, 378 A.2d 235, 245 (1977). The threshold question is whether compelling the election impairs to an appreciable extent any of the policies underlying the rights involved. *McGautha* v. *California, supra,* 402 U.S. at 213. Hence, the inquiry must focus upon whether the New Jersey murder statutes' sentencing scheme "unnecessarily" places a burden upon the accused's assertion of his constitutional right to defend against a criminal charge. *State* v. *Corbitt, supra,* 74 N.J. at 397, 378 A.2d at 244. Resolution of the issue requires examination of the nature and gravity of the choice confronting a defendant charged with murder.



Appellant claims that he was penalized by virtue of his election to proceed to trial. In essence, he contends that he would have been eligible for a term less than life imprisonment had he pleaded *non vult.* It is argued that the New Jersey murder statutes place an unconstitutional penalty upon the exercise of the right to contest the State's charges before a jury. Appellant argued below that one accused of murder is faced with the "grisly" choice between contesting the State's charges, thus assuring a penalty of life imprisonment if convicted of first degree murder, and pleading *non vult* with the attendant potential of being sentenced to a lesser term of years. It

is argued that such a grave choice exacts a penalty with regard to those who wish to exercise valued constitutional rights.

In support of this claim, defendant heavily relies upon *United States* v. *Jackson,* 390 U.S. 570 (1968). There, this Court declared invalid the death penalty provision of the Federal Kidnapping Act because it "unnecessarily" and "needlessly" burdened the defendant's right to contest the prosecution's charges before a jury. That statute provided that capital punishment could be imposed only upon a jury's recommendation which was binding on the trial court. 18 U.S.C. §1201(a). A defendant could be assured of avoiding the death penalty only by waiving a jury trial or entering a guilty plea. This Court reasoned that since the defendants could avoid the death penalty only by pleading guilty or proceeding to trial before a judge, they were "needlessly encourage[d]" to waive their basic rights both to contest guilt and to do so before a jury. 390 U.S. at 583. While recognizing the State's legitimate interest in jury-imposed capital punishment, the Court found that there were other means available which would subject all defendants to an equal risk of death and thereby eliminate the "unnecessary" and "excessive" burden upon defendants who desired a jury trial. 390 U.S. at 582.

As a result of the decision in *Jackson,* grave doubts were generated with respect to the validity of statutes which permitted a criminal defendant to avoid capital punishment by foregoing a jury trial. Like the Federal Kidnapping Act, the New Jersey murder statutes provided that only a jury could impose the death penalty. *State* v. *Forcella,* 52 N.J. 263, 245 A.2d 181 (1968), *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972). However, our statutory scheme differed because a defendant could not be tried by a judge. *Id.* at 269, 245 A.2d



at 184. Furthermore, acceptance of a plea of *non vult,* by which a defendant could escape the possibility of facing death, was discretionary with the trial court. *Id.* at 270-71, 245 A.2d at 184-185. In *State* v. *Forcella, supra,* the New Jersey Supreme Court held that the Sixth Amendment challenge was meritless because the New Jersey statute required trial by jury in all cases in which the accused contested his guilt. *Id.* at 272, 245 A.2d at 185. As for the claim that the Fifth Amendment was violated, a majority reasoned that acceptance of a plea of *non vult* was discretionary with the trial judge, and thus, the impermissible encouragement to plead guilty that existed under the Federal Act was not present under the New Jersey statute. *Id.* at 279-80, 245, A.2d at 189-190. The majority further reasoned that the *non vult* plea was enacted pursuant to valid governmental interest to provide lenity for those who were willing to admit their guilt. *Id.* at 275, 245 A.2d at 187. The New Jersey Supreme Court, therefore, upheld our capital penalty provision in recognition that it constituted nothing more than a form of plea bargaining by allowing consideration to be given to the accused who admits his guilt. *Id.* at 275-276, 245 A.2d at 187.

Significantly, the majority in *Forcella* accurately forecasted the question in *State* v. *Corbitt, supra.* Specifically, the majority suggested that striking the death penalty might still leave a "*Jackson*-type difficulty" in that a defendant who pleads *non vult* would receive life or a term of years whereas a defendant found guilty of first degree murder would necessarily receive life imprisonment. Since the Court concluded that the New Jersey statutes did not fall afoul of the Fifth and Sixth Amendments, the majority found it unnecessary to resolve the issue. The two dissenting Justices were of the view that this Court's decision in *Jackson* were dispositive and that the New Jersey statutes

infringed upon the constitutional right to defend against the State's charges before a jury. The dissenters, therefore, found it necessary to squarely confront the question presented in *Corbitt*.

The dissenting opinion in *Forcella* rejected the contention that a statute mandating life imprisonment upon a conviction following a jury trial but permitting a lesser penalty upon a plea of *non vult* would be violative of the Fifth and Sixth Amendments. According to the dissent, "the inducement [to plead *non vult*] would be insignificant when compared to the death penalty stricken in *Jackson*." 52 N.J. at 300, 245 A.2d at 201. The dissenters aptly observed that "the law has always been administered with pragmatic recognition of the fact that the difference between the death penalty and imprisonment entails more than matters of logic and degree." *Id. Jackson* was distinguished upon the basis that it was "concerned solely with the grisly choice between a plea or waiver with an assurance of no death penalty, and a jury trial with the danger of capital punishment." *Id.* at 301. This same conclusion was reached by the New Jersey Supreme Court in *State* v. *Corbitt, supra,* 74 N.J. at 399, 378 A.2d at 235.

In any event, this Court was unconvinced by the majority's reasoning in *State* v. *Forcella, supra,* and summarily reversed and remanded the matter three years later. *Funicello* v. *New Jersey,* 403 U.S. 948 (1971). On remand, the New Jersey Supreme Court struck the capital penalty provision. *State* v. *Funicello,* 60 N.J. 60, 286 A.2d 55, *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972). It ruled that in all future cases, those found guilty of first degree murder by a jury would be sentenced to a mandatory term of life imprisonment and that the penalty provisions applicable upon a plea of *non vult* would remain intact. *Id.* at 68, 286 A.2d at 59.



Hence, in 1972 the New Jersey Supreme Court provided the framework under which the murder statutes were to be applied and administered. Accordingly, a defendant who proceeds to trial faces the possibility of receiving a life sentence if found guilty of first degree murder. He may also be found guilty of second degree murder, in which case he faces a maximum exposure of 30 years imprisonment, N.J.S.A. 2A:113-4, or manslaughter, in which event he faces a maximum sentence of ten years, N.J.S.A. 2A:113-5. He may also be acquitted. A defendant who pleads *non vult* to murder may receive a sentence of life imprisonment. The court may, however, impose a maximum term of 30 years. N.J.S.A. 2A:113-3.

It is manifest that the sentencing scheme of the New Jersey murder statute is fundamentally different from that struck down in *United States* v. *Jackson, supra.* As noted previously, this Court found it constitutionally offensive to subject only those who contested their guilt before a jury to a greater penalty than all other similarly situated individuals who elected to contest the State's charges. Under the New Jersey statutes, however, the defendant faces exactly the same maximum sentence exposure. Whether he proceeds to trial or enters a plea of *non vult,* he cannot avoid the potential of receiving a life sentence by admitting the State's charges. This exposure to the identical maximum sentence eliminates the incongruity found offensive in *United States* v. *Jackson, supra.* In sum, no penalty whatever is imposed upon an accused who elects to defend against the State's charges.

**2. *United States v. Jackson applies only where the death penalty is a consideration in the decision to defend against a charge or plead guilty.***

The question, therefore, is whether the mere possibility of receiving a term of less than life imprisonment by pleading *non vult* "unnecessarily" serves to penalize those who elect to contest their guilt. Stated somewhat differently, at issue is whether our statutory scheme places an unwarranted and needless burden upon an accused who wishes to defend against the State's charges by mandating life imprisonment upon a jury finding of guilt. As we have noted, the strength of the inducement to obtain the benefit and avoid the burden can be ascertained only by carefully focusing upon the magnitude of the choices involved. In our view, *United States* v. *Jackson, supra,* is clearly distinguishable in this respect because capital punishment is qualitatively different than mere imprisonment. Its finality and severity make the death penalty *sui generis.* Although this Court has recently held that capital punishment is not per se "cruel and unusual" and, hence, violative of the Eighth Amendment [*Gregg* v. *Georgia,* —— U.S. ——, 96 S. Ct. 2909 (1976)], it has been recognized that "[t]he calculated killing of a human being by the State involves by its very nature, a denial of the executed person's humanity." *Furman* v. *Georgia,* 408 U.S. 238, 290 (1972). So too, it has been said that "[d]eath is not only an unusually severe punishment, unusual in its pain and its enormity . . .," but it is also "truly awesome" because it destroys the right of an executed person "to have rights." *Furman* v. *Georgia, supra,* 408 U.S. at 290. "Death is a punishment different from all other sanctions in kind rather than degree." *Woodson* v. *North Carolina,* —— U.S. ——, 96 S.Ct. 2978 (1976). See also *Roberts* v. *Louisiana,* —— U.S. ——, 96 S.Ct. 3001 (1976). Certainly, the enormity of choosing



between life and death precludes a meaningful exercise of the right to assert one's innocence. The *Jackson* decision made constant reference to the inordinate burden of facing the choice between life and death. 390 U.S. at 572, 581. As the Court noted:

> Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. (390 U.S. at 580.)

Capital punishment has always been regarded as such a unique penalty that any choice between life and death has been characterized as a "grisly" one. See, *e.g., Furman* v. *Georgia,* 408 U.S. 238, 286-90 (1972) (Brennan, J., Concurring); *Fay* v. *Noia,* 372 U.S. 391 (1963); *United States* v. *Coke,* 404 F.2d 836, 846 n. 9 (2 Cir. 1968); *Commonwealth* v. *O'Neal,* 339 N.E. 2d 676, 680 (Mass. 1975). It is evident that the possibility of death is a far different price to pay for contesting one's guilt than the risk of a sentence of life imprisonment instead of a possible term of years.

Subsequent judicial holdings have made it apparent that *United States* v. *Jackson, supra,* forbids only government induced choices of a substantial nature akin to that involving the clear cut question between life and death.

In *Crampton* v. *Ohio,* 402 U.S. 103 (1971), this Court upheld the constitutionality of Ohio's system of conducting criminal trials. In Ohio, the jury is permitted to determine guilt and punishment in a single proceeding. Petitioner argued that unless the trial were bifurcated, he would be coerced to forego his right to remain silent in

order to argue for mitigation. This he contended "chilled" his Fifth Amendment right because he risked a harsher sentence if he remained silent. This Court held that the Ohio system did not place an impermissible burden on the petitioner's assertion of his Fifth Amendment right. In short, the Court concluded that, "although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." 402 U.S. at 213. In so holding, it was noted that the decision in *Jackson* was limited to government compelled choices involving life and death.

Similarly, in *Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973), this Court reiterated the principles set forth in *Crampton* v. *Ohio, supra,* and upheld Georgia's unrestricted jury resentencing procedures. Petitioner had been convicted and sentenced to 15 years in prison by a jury on a charge of robbery. He thereafter successfully obtained a writ of habeas corpus. Petitioner was then retried, convicted, sentenced to life imprisonment by a jury which had no knowledge of the previous sentence. Petitioner argued that the possibility of receiving a harsher sentence on retrial had a chilling effect on the exercise of his right to appeal or collaterally attack his conviction. The Court was unpersuaded and rejected petitioner's claim that its holding in *United States* v. *Jackson, supra,* called for abrogation of the Georgia system. It reasoned that the Georgia practice was a legitimate one and that an incidental consequence of the procedure was that it required the accused to choose to accept the risk of a greater sentence or waive his rights. 412 U.S. at 32-33. Despite the fact that under Georgia's system an accused might be penalized by exercising his right to appeal, the Court held that the possibility of receiving a harsher sentence did not needlessly exact an unconstitutional burden. 412 U.S. at 35.



Courts in other jurisdictions besides New Jersey have also construed the holding in *United States* v. *Jackson, supra,* as applying only to the "grisly" choice between life and death. In *Whaley* v. *State,* 202 Kan. 175, 446 P.2d 397 (1968), for example, the Kansas Supreme Court rejected a claim that an accused was discouraged from asserting his Fifth and Sixth Amendment rights because of the possibility that the prosecutor would invoke the habitual offender statute if he proceeded to trial. The Court noted that the possibility of an enhanced sentence by electing to contest the State's charges does not alone constitute a burden of the magnitude involved in *Jackson. Id.* at 176, 446 P.2d at 398.

Likewise, the Illinois Court of Appeals has held that the financial burden placed upon an accused who elects to contest his guilt by proceeding to trial does not constitute a "substantial" penalty for the assertion of a constitutional right. In *People* v. *Peters,* 32 Ill. App. 3d 1018, 337 N.E. 2d 73 (Ill. App. Ct. 1975), defendant contended that an Illinois statute which required an accused to reimburse the State's attorney with respect to per diem expenses upon conviction following a trial, deprived him of his Fifth Amendment right to contest his guilt More specifically, it was argued that an assessment of trial costs made pursuant to the statute constituted a penalty imposed by virtue of the defendant's election to defend against the State's charges. The Court of Appeals summarily rejected defendant's claim that *United States* v. *Jackson, supra,* was applicable. The Court held that the financial burden imposed by the statute was infinitely less substantial than the possibility of receiving the death penalty. Hence, the statute did not serve to penalize those who elected to contest their guilt. See also *Fuller* v. *Oregon,* 417 U.S. 40 (1974) (Oregon recoupment statute for attorney's fees does not impermissibly chill assertion of the right to counsel).

It is thus apparent that the mere possibility of receiving a lesser term of imprisonment upon a plea of *non vult* does not serve to penalize those who choose to defend against the State's charges. Even were we to conclude that our statutory scheme imposes a burden with respect to those who elect to contest their guilt, it would not fall afoul of the Fifth and Sixth Amendments. The New Jersey murder statutes do not suffer from the same infirmity as that found to be present in the Federal Kidnapping Act in *United States* v. *Jackson, supra.* The election compelled by our statutes does not impair "to an appreciable extent" any of the policies which the Fifth and Sixth Amendments seek to protect. In short, our statutory scheme does not compel a defendant to choose between exercising his constitutional rights with the attendant risk of exposing himself to the death penalty and pleading *non vult,* thereby avoiding the danger of capital punishment. *State* v. *Corbitt, supra,* 74 N. J. 379, 399, 378 A.2d 235, 245 (1977).

***3. No needless nor unnecessary burden is placed upon a defendant who chooses to contest his guilt.***

It is the position of the State of New Jersey that *United States* v. *Jackson, supra,* is inapposite for another reason. As we have noted, the Supreme Court concluded that the death penalty provision in the Federal Kidnapping Act "needlessly encourage[d]" those charged with having committed the offense to waive their rights both to contest guilt and to do so before a jury. *Id.* at 583. The federal statute was said to impose an "unnecessary" and "excessive" burden upon those who desired a jury trial. *Id.* at 582. The use of these terms by this Court plainly indicates that not every burden imposed upon a defendant who elects to contest the State's charges is subject



to constitutional attack. As already pointed out, numerous consequences necessarily flow from a decision to exercise the Fifth Amendment privilege against self-incrimination. For example, although an accused is under no constitutional obligation to present witnesses or to testify in his own behalf at trial, such a course of conduct may substantially increase the risk of conviction. But we have noted that such a dilemma has never been thought an invasion of a defendant's constitutional rights, for the burden imposed is neither "needless," "unnecessary," nor "excessive." The inquiry must thus focus upon whether the option present in the New Jersey statutory scheme is reasonably related to a proper governmental goal.

We note in this context that if the Fifth Amendment bars a lesser penalty when guilt is admitted, the entire practice of plea bargaining is necessarily implicated. In the aftermath of *Jackson,* it was widely recognized that plea bargaining was subject to doubt. See, *e.g.,* Comment, 54 *Cornell L. Rev.* 448 (1969); Poe, "Capital Punishment Statutes in the Wake of *United States* v. *Jackson*: Some Unresolved Questions," 37 *Geo. Wash. L. Rev.* 719 (1969); "The Supreme Court, 1967 Term," 82 *Harv. L. Rev.* 63, 156 (1968); Note, "The Unconstitutionality of Plea Bargaining," 83 *Harv. L. Rev.* 1387 (1970); Comment, 44 *N.Y.U. L. Rev.* 612 (1969); Comment, 47 *N.C. L. Rev.* 421 (1969); Note, "Discriminatory Sentencing and the Unitary Trial: Two Areas For Application of the United States v. Jackson Rationale," 31 *U. Pitt. L. Rev.* 118 (1969); Comment, 1969 *Wash. U.L.Q.* 231 (1969). See also Comment, 22 *Rutgers L. Rev.* 167 (1967). The broadest interpretation of *Jackson* could conceivably lead to a conclusion that whenever a system provides a means to obtain leniency, either by statute or practice, a defendant who rejects a proposed plea bargain, contests guilt, and thus receives a heavier penalty is deprived of his Fifth Amendment rights.

Such broad implications were quickly dispelled by this Court in *Brady* v. *United States,* 397 U.S. 742 (1970), *Parker* v. *North Carolina,* 397 U.S. 790 (1970), and *North Carolina* v. *Alford,* 400 U.S. 25 (1970). There, defendants, who had pleaded guilty to avoid the possible imposition of the death penalty, attempted to retract their pleas by asserting that the statutes under which they were prosecuted dissuaded them from asserting their constitutional rights. The principal thrust of their argument was grounded upon the claim that they had abandoned their right to defend in order to safeguard their right to live. They thus asserted that their guilty pleas were "coerced." This Court perceived no constitutional violation. More specifically, it was reasoned that the defendants' dilemma was no different from the circumstances existing in any common plea bargaining situation. 397 U.S. at 751. Although it was recognized that plea bargaining has a potentially chilling effect on assertion of Fifth and Sixth Amendment rights, the practice was upheld as a necessary and legitimate adjunct to the administration of criminal justice. 404 U.S. at 751-753.

This Court subsequently reiterated its position with regard to plea bargaining. In fact, in *Santobello* v. *New York,* 404 U.S. 257 (1971), it was suggested that plea bargaining is a virtuous and desirable practice which should be encouraged. This, despite the fact that plea bargaining presents a potentially chilling effect upon the assertion of the constitutional right to defend.

It bears repeating that plea bargaining is predicated upon the just and humane concept that those who acknowledge guilt are probably better prospects for rehabilitation and should be given consideration on that account. Surely, "we should not deny a justified leniency for the many, merely to be positive that no man is needlessly encouraged



not to defend." *State* v. *Forcella, supra,* 52 N.J. at 276, 245 A.2d at 188. The gain to the many plainly outweighs whatever evil may repose in encouraging the guilty to confess. As to the fear that the innocent might be stampeded, "there are safeguards against a false guilty plea." *Id.* A plea of guilty may not be entered if the accused claims he is innocent. Further, in New Jersey a "factual basis" must support the defendant's decision not to contest the State's charges. See *State* v. *Reali,* 26 N.J. 222, 139 A.2d 300 (1958). With respect to those who perceive a benefit in the form of a lesser sentence if they plead guilty, it can hardly be argued that they are "needlessly" penalized by virtue of their election to reject such a course. The potential of receiving a lesser penalty upon a plea of guilty is not "unnecessary." Nor is the burden that is incidentally imposed upon such an individual "excessive."

Our *non vult* statute embodies the principles of plea bargaining. It achieves the same result as the downgrading of offenses or the dismissal of selected charges. The statute cannot be found to unnecessarily and needlessly discourage assertion of an individual's Fifth and Sixth Amendment rights. A defendant who proceeds to trial on a murder charge no longer faces a "grisly" choice. His knowledge that those who plead *non vult* face the same possibility of a life term certainly diminishes any alleged agony inherent in his choosing a trial over a plea. Finally, his knowledge that others who plead may receive a sentence less than life imprisonment is no different from the situation confronting all defendants who proceed to trial, aware of the fact that others have obtained bargains to plead guilty in exchange for dismissal of other pending charges or for some other benefit. In short, there are no excessive or unnecessary conditions encompassed in the present New Jersey murder statutes such as to render them unconstitutional.

**B. The sentencing scheme of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 does not constitute a violation of a defendant's right to equal protection.**

The Appellant has argued that the sentencing scheme of the New Jersey murder statute violates the Equal Protection Clause of the Fourteenth Amendment. He has pointed to the fact that those who have pleaded *non vult* may be sentenced to a term of years, while others who have been convicted of first degree murder following a trial are necessarily sentenced to life imprisonment. N.J.S.A. 2A:113-3, 4. The import of the argument is that the State may not impose "different punishments for the same" crime where the differing penalties are based entirely on whether the accused has chosen to stand trial. (See Jurisdictional Statement at 12).

It is the contention of the State of New Jersey that it would be grossly unfair if all had to be sentenced without regard to their acknowledgment of guilt. While it is true that the law may not add a penalty by virtue of a defendant's election to contest the State's charges, *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969), *Thomas* v. *United States*, 368 F.2d 941 (5 Cir. 1966), it is not irrational to take into account "defendant's prospect for redemption reflected by his attitude toward the truth." *State* v. *Poteet*, 61 N.J. 493, 295 A.2d 857 (1972). As the New Jersey Supreme Court aptly observed in *State* v. *Poteet*, *supra*, "[t]he aims of punishment are several, but the hope is constant that . . . mild or severe, [it] will shape the offender." *Id.* at 496, 295 A.2d at 859. "Assaying the prospects for rehabilitation, the court must look at the man as well as the offense," and it is here that a defendant's candid acknowledgment of guilt should be given some consideration. *Id.* Although it would be conceptually wrong to enlarge the crime for which a defendant is being



punished because he chose to stand trial, it is equally clear that a legislative judgment based upon the premise that a frank confession indicates some promise of rehabilitation is neither unsound nor unjust. In any event the State of New Jersey has exhaustively set forth its argument with regard to this question in Point A. Suffice it to say, we do not perceive it to be a violation of equal protection to accord a benefit to those who have acknowledged their guilt by pleading *non vult*.

Other considerations support our position. First, our statutes do not provide disparate punishments "for the same offense." A short form indictment is sufficient to encompass first and second degree murder. Hence, a defendant is not permitted to plead *non vult* to any particular degree of murder. In the words of the statute, the plea is to be directed "to the indictment" which charges murder generally. In contrast, the mandatory term of life imprisonment is applicable only following a jury finding of first degree murder. It is apparent, therefore, that those who plead *non vult* to "murder" and those who are found guilty of first degree murder are not similarly situated. The sentencing scheme merely reflects this basic reality. Second, an Equal Protection argument is predicated upon the erroneous assumption that all similar conduct constitutes the "same offense." Although we will shortly set forth our argument in some detail, it is enough to observe here that criminal statutes often overlap in prohibiting the same conduct and a prosecutor's decision to proceed under one or another has never been thought to offend the concept of equal protection. The same principles are applicable with respect to our murder statutes. Although the offense of "murder" and "murder in the first degree" may be said to "overlap," equal protection is not offended as

long as the court does not act arbitrarily in exercising its discretionary power to accept or reject a plea of *non vult*.

***1. There is no cognizable class against which equal protection is being denied.***

The guarantee of equal protection requires that a legislative classification bear a rational relationship to a legitimate governmental goal. See *Tussman and Ten broek,* "The Equal Protection of the Laws," 37 *Calif. L.Rev.* 341, 348 (1949); Note, "Developments in the Law: Equal Protection," 82 *Harv. L.Rev.* 1065, 1077-81 (1969). When a legislature creates a classification, those similarly situated must be treated alike. *Tussman and Ten broek, supra* at 344-46. It is manifest that the threshold question in resolving any alleged equal protection violation is whether the challenged legislation or state practice creates any classification whatsoever. The point is best illustrated by Justice Harlan's dissenting opinion in *Griffin* v. *Illinois,* 351 U.S. 12 (1956). There, it will be recalled, the majority held the Illinois practice which required an appellant to absorb the costs of providing a transcript on appeal constituted a violation of equal protection because it unreasonably discriminated on the basis of wealth. Justice Harlan dissented, contending that the basis for the majority holding was not equal protection but rather due process. 351 U.S. at 36. He explained that when the State imposes legal disabilities upon a named class the equal protection guarantee is called into question. *Id.* at 35-36. Merely posing a choice or condition to receipt of a State-proffered benefit, on the other hand, involves no classification. *Id.* Accordingly, such a system is properly analyzed by employing the "fundamental fairness" standard of the due process clause. *Id.* at 36.



In the instant case, the initial inquiry is whether the Legislature has in fact made any classification which arbitrarily treats those similarly situated. Otherwise stated, the question presented is whether the New Jersey Legislature has singled out a particular group of individuals and arbitrarily imposed upon that class a legal disability that it does not impose upon all others in a like position. So posited, the State of New Jersey submits that the only class created by the Legislature was the unitary category of indicted murderers. Our statutes offer a series of effectively identical choices to all members of this class. Specifically, all defendants have the opportunity to plead *non vult*. Acceptance of the plea, of course, is in the discretion of the court. Of significance, however, is that all defendants possess an equal opportunity to request the court's indulgence. Thus, the system does not designate two separate classes to which it imposes distinct legal disabilities. Rather, our system merely provides several courses of action to all defendants charged with murder. As such, it is evident that this case does not implicate values underlying the equal protection clause. Rather the question presented is one of due process. Specifically, the issue is whether the election compelled by our statutory scheme is fundamentally unfair. The fairness of the choice, phrased in terms of whether it is unconstitutionally onerous, has been amply demonstrated in Point A, *supra*. Accordingly, we submit that appellant's contention regarding the alleged denial of the equal protection guarantee is without merit.

***2. Assuming a cognizable class, there is no disparity of punishment for the same offense.***

A *non vult* plea to murder in New Jersey does not involve the same crime as a conviction for first degree mur-

der, although in some circumstances both may encompass similar conduct. First degree murder is a crime in which conduct of a specific nature and quality is proscribed. The sentence for such conduct is life imprisonment. A *non vult* plea is not comparable to a conviction of a specific degree of murder. *State* v. *Sullivan,* 43 N.J. 209, 245, 203 A.2d 177, 197 (1964), *cert.* den. 382 U.S. 990 (1966); *State* v. *Williams,* 39 N.J. 471, 479, 189 A.2d 193, 197 (1963), *cert.* den. 374 U.S. 855 (1963). Rather, it is a plea to the indictment encompassing conduct which may constitute both degrees of murder, and manslaughter as well. *State* v. *Sullivan, supra,* 43 N.J. at 246, 203 A.2d at 197. The plea must be accepted without specification of the degree of guilt. *Id.* Accordingly, the sentence for the plea spans the broad range of conduct encompassed by the indictment. It is apparent that a plea of *non vult* is for an offense different from first degree murder because it includes a far broader range of criminal conduct.

It was upon this basis that a similar claim was rejected by the New Jersey Supreme Court in *State* v. *Sullivan, supra.* There, the defendant had been convicted of first degree murder. On appeal, he contended that our murder statutes exacted a penalty with regard to those who elected to contest their guilt. It was argued that disparate penalties were imposed depending upon the accused's election to plea *non vult* or contest the State's charges. Defendant claimed that such an election deprived those charged with murder "of due process and equal protection of the law." *Id.* at 245, 203 A.2d at 197. The court was unpersuaded.

> Not only is there no right to demand acceptance of a plea of *non vult,* but acceptance thereof by the court confers no right to any particular sentence short of life imprisonment. As N.J.S.A. 2A:113-3 prescribes, the term may be for life or for any



> period up to the 30-year maximum for second degree murder. *One reason for the broad expanse of sentencing power is the nature of the indictment.* As we have said, *it specifies no degree of murder, and will support a conviction of first or second degree murder or manslaughter.* (We note in passing it has been suggested persuasively that there is nothing in our rules or statutes which prohibits a specific indictment for second degree murder in a proper case.) *Under our cases the plea must be to the indictment.* It should *not* be to a specific degree of murder. *Nor does the statute, as in earlier days, contemplate a hearing to determine the degree of guilt or the nature of the sentence to be imposed. State* v. *Williams,* 39 N.J. 471, 479 (1963). Sentence is passed by the court within the broad limits authorized after consideration of the nature of the offense and a comprehensive probation report. R.R. 3:7-10(b). [*Id.* at 246-247, 203 A.2d at 197; emphasis supplied].

Appellant contends that since an accused who theoretically commits the same crime as one convicted of first degree murder may plead *non vult,* our statutes impose different punishments for the same offense. This argument is based on the faulty assumption that all similar conduct constitutes the same crime. It is evident, however, that an accused's conduct may violate two overlapping statutes. Where there is such an overlap, the prosecuting authority has discretion to proceed under either statute. *United States* v. *Berrigan,* 482 F.2d 171 (3 Cir. 1973); *Newman* v. *United States,* 127 U.S. App. D.C. 263, 382 F.2d 479, 480 (1967). So long as the prosecutor does not act arbitrarily and does not discriminate against a class of defendants, it has been held that equal

protection is not denied. *United States* v. *Rugiero,* 472 F.2d 599, 606 (2 Cir. 1973), *cert.* den. 412 U.S. 939 (1973); *United States* v. *Eisenmann,* 396 F.2d 565, 568 (2 Cir. 1968); *United States* v. *Andrews,* 370 F.Supp. 365, 370 (D. Conn. 1974). In short, the mere existence of overlapping statutes is not a deprivation of equal protection.

Just as two or more statutes may cover the same conduct so that different penalties may be imposed for the identical offense, the New Jersey murder statutes may be said to "overlap." The major difference is that under our murder laws, the discretion to administer the statutes does not reside solely in the prosecutor. Instead, the accused may tender a plea of *non vult,* but the court must decide whether to accept it. If a conviction for first degree murder best serves the legislative purpose, the plea must be rejected or a comparable sentence be imposed. *State* v. *Sullivan,* 43 N.J. 209, 203 A.2d 177 (1964), *cert.* den. 382 U.S. 990 (1966); *State* v. *Forcella,* 52 N.J. 263, 245 A.2d 181, *cert.* den. *sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972).

To further clarify the point, the situation can be viewed in a slightly different fashion. In many instances in which an individual commits a criminal act, his conduct may constitute both a greater and lesser offense. For example, activity which constitutes atrocious assault and battery in New Jersey is also proscribed by our disorderly persons statute. Activity which constitutes robbery also falls within our larceny statute. The prosecutor has discretion to choose the charge. Furthermore, he can charge the greater offense and then later downgrade it in exchange for a plea of guilty. The individual who is tried and convicted of the greater offense is not denied equal protection because another who may have engaged in similar conduct is either charged or convicted of the lesser crime.



Analogously, one who is convicted of first degree murder cannot complain that he was denied equal protection because another was permitted to plead *non vult.* Viewed within this context, it is apparent that equal protection is denied only if the various relevant statutes are applied in an arbitrary or discriminatory fashion. If no particular class is singled out for harsher treatment, the equal protection clause is not violated.

### *3. The penalty provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 are not applied arbitrarily nor irrationally.*

Any analysis of the manner in which statutes are applied must be considered in light of the proposition that "Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969). As long as some reasonable basis exists for the recognition of separate classes and disparate treatment, and the legislation has a rational relation to the object sought to be achieved, there is no constitutional infirmity. See *Eisenstadt* v. *Baird,* 405 U.S. 438, 446-447 (1972); *United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U.S. 4 (1970). The function of the judiciary in reviewing a statute "is to determine whether it is possible to say that the legislative decision is without rational basis." *Clark* v. *Paul Gray,* 306 U.S. 583, 585 (1939).

It is the position of the State of New Jersey that the rational relationship test for determining equal protection should be utilized in analyzing the sentencing provisions of the murder statutes. This court, recognizing this traditional test, has in recent years recognized that

there are some situations where it is inappropriate to apply the "rational relationship" test. Certain statutory classifications are so inherently suspect as to compel greater judiciary scrutiny (*i.e.*, those based on race, nationality, alienage, political affiliation and sex). So too, statutory schemes which affect fundamental rights are to be carefully reviewed. In these cases, a stricter equal protection standard has been fashioned by this Court requiring a showing that the statutory scheme challenged is based upon a "compelling governmental interest." Phrased somewhat differently, if a statutory classification is based upon an inherently suspect criterion, or if it affects fundamental rights, then it must be demonstrated that the legislation is necessary to promote a compelling governmental interest. See *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (Harlan, J. dissenting). A heavy burden of justification is imposed upon the State and such statutes are closely scrutinized in light of their essential purposes. *Dunn* v. *Blumstein,* 405 U.S. 330 (1972). *State* v. *Chambers,* 63 N.J. 287, 307 A.2d 78 (1973).

It is submitted that the New Jersey statutory scheme for murder does not create a classification which is "inherently suspect." It does not affect fundamental rights, *i.e.,* those which are based solely on race, nationality, political affiliation, sex, the right to vote or the right to travel. Nor does our statute affect the fundamental right to live. The latter classifications have been found to be inherently suspect and, thus, have been evaluated under the "compelling governmental interest" formula. See *e.g. Frontiero* v. *Richardson,* 411 U.S. 677, 686-87 (1973); *Reed* v. *Reed,* 404 U.S. 71, 75 (1971); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972). On the other hand, legislatures are allowed considerable leeway in classifying offenses and offenders for sentencing purposes, provided there is a rational nexus



between the classification and a valid legislative purpose. *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

When an individual violates a penal law, he is generally subject to incarceration. In short, he has lost his right to liberty. In such instances, the State need not demonstrate a compelling governmental interest to support incarceration. Rather, it need only be shown that the punishment imposed is reasonably related to a proper governmental goal. Thus, the proper test to be employed here is the "rational relationship" formula. *State* v. *Corbitt,* 74 N.J. 379, 401, 378 A.2d 235, 247 (1977). See *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973).

It is apparent that a mandatory life term for first degree murder is reasonably related to the goal of deterrence. Mandatory penalties are within the power of the legislature to prescribe and the judiciary seldom acts to challenge their validity. See *State* v. *Howland,* 103 Ariz. 250, 439 P.2d 821 (1968); *McDonald* v. *State,* 501 F.2d 385 (8 Cir. 1974), *cert.* den. 419 U.S. 1004 (1974); *State* v. *Colcord,* 170 Minn. 502, 212 N.W. 894 (1927). In this context, the statutory penalty challenged here serves as a warning to those who might be predisposed to commit the criminal offense that they will be harshly dealt with upon conviction. The penalty is applicable to a class of offenders whose disregard for life justifies severe punishment.

In any event, it is clear that the penalty is supported by a compelling governmental interest. It is incumbent upon the State to protect its citizens against premeditated and deliberate attacks. In sum, the statutory penalty serves a compelling governmental interest in deterring criminal conduct. The judiciary cannot and should not substitute its judgment for that of the Legislature.

On the other hand, the penalty provided for a plea of *non vult* to murder without specification as to degree, an offense which is different from first degree murder, is rational. The penalty range is necessarily broad since the criminal conduct encompassed is great. This range is reasonably related to the governmental goal of promoting rehabilitation. Since the penalty provisions of N.J.S.A. 2A:113-3, 4 are reasonably related to proper governmental goals, we respectfully submit that the guarantee of equal protection is not denied by the sentencing scheme of the statutes.

## III.

## CONCLUSION

**Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal.**

Respectfully submitted,

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Supreme Court, U. S
FILED
APR 11 1978
MICHAEL RODAK, JR., CL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5903

McARTHUR CORBITT,

*Appellant,*

v.

STATE OF NEW JERSEY,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

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September 15, 1978

Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: McArthur Corbitt v. New Jersey
No. 77-5903

Dear Mr. Rodak:

In reviewing my brief in the above case I found that on page 15 I had inadvertently misquoted the opinion of the Supreme Court of New Jersey to the effect that "...encouragement of guilty pleas is at the very heart of an effective plea negotiation program." The actual quote should read as follows:

> ...encouragement of guilty defendants not to contest their guilt is at the very heart of an effective plea negotiation program.

I would appreciate it very much if you would advise the Court of this correction and convey my sincere apologies for this mistake.

Sincerely,

James K. Smith

JAMES K. SMITH, JR.
Assistant Deputy
Public Defender

JKS/lgr
cc: Attorney General



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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**No. 77-5903**

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McARTHUR CORBITT,

*Appellant,*

v.

STATE OF NEW JERSEY,

*Appellee.*

---

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

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## BRIEF FOR APPELLANT

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## OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, entered on September 23, 1975, is unpublished. A copy of that opinion is included in the printed Appendix at A. 9.

The opinion of the Supreme Court of New Jersey, announced on October 6, 1977, is reported at 74 N.J. 379, 378 A.2d 235 (1977). A copy of that opinion is set forth in the Appendix at A. 14.

## JURISDICTION

At his sentencing and on appeal defendant Corbitt challenged the constitutionality of the sentencing provisions of the New Jersey murder statute, *N.J.S.A.* 2A:113-1 to 4. The Supreme Court of New Jersey specifically held the statute to be valid, ruling that it did not violate either the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution. Jurisdiction in this case is conferred by Title 28, United States Code, §1257(2). *Cohen v. California*, 403 U.S. 15, 17 (1971).

## QUESTIONS PRESENTED

1. Whether the New Jersey murder statute, which imposes a mandatory life sentence on defendants convicted of felony murder after a jury trial, but which allows defendants who do not contest their guilt to be sentenced to a term of years, served to penalize the exercise of the appellant's Fifth and Sixth Amendment rights to a jury trial.

2. Whether, consistent with the Equal Protection Clause, a state may enact a statute which provides separate scales of punishment for those persons who plead to an offense as opposed to those persons who are convicted after a jury trial.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

At issue in this appeal is the constitutionality of *N.J.S.A.* 2A:113-1 to 4 which is set forth in full in the printed



appendix at A. 3. Relevant constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, all of which are set forth in an addendum to this brief.

## STATEMENT

Defendant Corbitt was indicted for two counts of arson and one count of murder as a result of two fires in an apartment building in Newark, New Jersey. At a jury trial in the Superior Court of New Jersey, Law Division, Essex County, defendant was convicted of one count of arson and one count of murder, but was acquitted on the other arson charge. (A. 5) All of the evidence presented at the trial pointed to a felony murder. Allegedly, after having a series of disagreements with his landlord concerning rent payments, defendant set fire to his apartment building to gain revenge. In the course of that fire, a visitor to a second floor apartment, Earl Redding, died of smoke inhalation. Defendant was arrested several weeks later after giving a statement to investigators for the Newark Arson Squad.

At the sentencing on May 16, 1973, defense counsel noted that if Corbitt had pleaded to the murder charge, he would have been eligible to receive a suspended sentence or a term of years in the State Prison. (A. 6) But because he had been convicted of this offense after a jury trial, defendant was subject to the mandatory life sentence imposed for first degree or felony murder. Thus counsel argued that the murder statute was in violation of this Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), and that the judge should exercise the same powers that he would have had in the event that defendant had

chosen not to contest the charges. (A. 6) However, the judge ruled that he was "powerless" to impose any sentence except life imprisonment. (A. 7-8)

In an opinion dated September 23, 1975, the Appellate Division of the Superior Court of New Jersey rejected defendant's contention that the penalty provision of the murder statute was unconstitutional and affirmed his conviction. However, because the case clearly involved a felony murder, the Appellate Division merged the arson conviction into the murder charge. (A. 9-12)

Defendant then petitioned the Supreme Court of New Jersey to review his case. In an order dated February 18, 1976 the Court agreed to hear the case but limited its review to "the questions of the validity of the mandatory life sentence upon a jury conviction for murder." (A. 13) On October 6, 1977 the New Jersey Supreme Court held by a five to two majority that the statute was constitutional. (A. 14) Specifically, the majority held that: (1) the holding of *United States v. Jackson* did not extend to cases where there was no threat of the death penalty; (2) even if *Jackson* was applicable, the New Jersey murder statute did not "needlessly" encourage guilty pleas; and (3) the statute did not violate the Equal Protection Clause because there was a rational basis for imposing separate penalty schedules. The two dissenting justices, in separate opinions, both found the mandatory life sentence to be needless and coercive. This appeal followed.

## SUMMARY OF ARGUMENT

A defendant in a criminal case may not be penalized in any manner for exercising his constitutional right to a jury



trial. This is true whether the penalty imposed is an increased sentence or the denial of sentencing alternatives. Since a defendant convicted of felony murder in New Jersey after a jury trial receives a mandatory life sentence, while a defendant who pleads to the offense and admits the same crime may receive a term of not more than 30 years in the State Prison, the murder statute clearly penalizes the defendant who insists upon his Fifth and Sixth Amendment rights to a jury trial by denying him valuable sentencing alternatives.

It makes no difference that the death penalty is not involved here as it was in *United States v. Jackson*, 390 U.S. 570 (1968). Rather, *Jackson* is merely one of a long line of cases in which this Court has held that neither courts nor legislatures may impose burdens upon the exercise of constitutional rights. Any sanction which makes assertion of a constitutional right "costly" is forbidden, even if that sanction is nothing more than the loss of one's employment for refusing to incriminate oneself, or the loss of welfare payments for exercising one's right to travel.

Moreover, this sentencing scheme cannot be justified on the theory that it is needed to facilitate plea bargaining. Although the murder statute is the only New Jersey law with separate penalty scales for those who plead guilty and those who go to trial, plea bargaining is an accepted and widespread practice within the state. Similarly, other states appear to conduct plea bargaining in homicide cases without relying on this sort of discriminatory sentencing provision. Thus the unique sentencing scheme of the New Jersey murder statute is certainly not necessary to plea bargaining.

Indeed, plea bargaining has nothing to do with this case. Plea bargaining is the practice whereby the prosecutor

offers certain sentencing concessions to a defendant in order to induce him to waive his right to a trial. But a defendant in a felony murder case in New Jersey is encouraged to plead to the offense, not because his maximum sentence exposure will be limited, but because if he goes to trial and is convicted, he must receive the maximum penalty. This is not plea bargaining, it is coercion. The murder statute does nothing to aid bargaining or negotiation, it is simply a unilateral penalty imposed only upon those persons who have exercised their Fifth and Sixth Amendment rights to a jury trial.

This statutory scheme also violates the Equal Protection Clause by establishing two penalties for the same offense, depending solely on whether the accused has insisted upon a jury trial. A defendant who pleads *non vult* in a felony murder case may receive up to 30 years in the State Prison or life imprisonment, while a defendant convicted of felony murder must receive life imprisonment. Because the classification here infringes upon the right to a jury trial, which is a fundamental constitutional right, the State of New Jersey must have a "compelling state interest" to justify the discriminatory scheme. But, no such compelling state interest exists. Indeed, even using the rational relationship test the statute must fall. While it may be permissible to extend leniency to those persons who admit their guilt, it does not follow that the defendant who insists upon his constitutional rights must be so incorrigible that only the maximum sentence would be appropriate. Rather, since the defendant who pleads to the offense is just as culpable as the defendant convicted at trial, both persons should be at least eligible for the same range of penalties. Certainly, no legitimate state purpose is served by imposing a mandatory maximum sentence upon only those persons



who have asserted their constitutional rights. Thus, this murder statute, which discriminates against those defendants convicted at a jury trial, clearly violates the Equal Protection Clause of the Fourteenth Amendment.

## ARGUMENT

### I.

### THE NEW JERSEY MURDER STATUTE PENALIZES THE EXERCISE OF ONE'S FIFTH AND SIXTH AMENDMENT RIGHTS BY IMPOSING A MANDATORY LIFE SENTENCE UPON ONLY THOSE DEFENDANTS WHO HAVE BEEN CONVICTED OF FIRST DEGREE MURDER AFTER A JURY TRIAL.

In *United States v. Jackson*, 390 U.S. 570 (1968), this Court struck down the death penalty provision of the federal kidnapping statute because it needlessly encouraged guilty pleas, while penalizing those defendants who exercised their Fifth and Sixth Amendment rights to a jury trial. The defendant would submit that the present New Jersey murder statute, as its predecessor which was struck down in *Funicello v. New Jersey*, 403 U.S. 948 (1971), is clearly unconstitutional because it too imposes a burden upon the right to a jury trial.

Under the federal kidnapping statute considered in *Jackson*, a defendant who pled guilty could receive no more than life imprisonment, while a defendant convicted at a jury trial risked the death penalty. The "inevitable effect" of this provision was, of course, to deter the assertion of Fifth

and Sixth Amendment rights, because a defendant risked his life by going to trial. 390 U.S. at 581. It did not matter that the statute may have been intended to mitigate the severity of the death penalty and that any deterrent effect on constitutional rights may have been incidental, because

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive. *Id.* at 582. [citations omitted]

Thus, because there was no need for the death penalty provision, it was struck from the remainder of the statute. *Id.* at 582-83. Later invalidated for the same reason was the sentencing provision of the Federal Bank Robbery Act. *Pope v. United States*, 392 U.S. 651 (1968).

The *Jackson* decision called into question the validity of the New Jersey murder statute, *N.J.S.A.* 2A:113-1 to 4, which also imposed the death penalty only upon defendants convicted of first degree murder after a jury trial. In *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1968), the Supreme Court of New Jersey upheld the statute and attempted to distinguish *Jackson.* But on appeal this Court in a memorandum opinion reversed the judgment "insofar as [it] impose[d] the death sentence." *Funicello v. New Jersey*, 403 U.S. 948 (1971). On remand the Supreme Court of New Jersey acknowledged that the death penalty provision was unconstitutional and attempted to preserve the remainder of the statute by merely excising the death penalty. *State v. Funicello*, 60 N.J. 60, 286 A.2d 55 (1972), *cert.* den. *sub nom New Jersey v. Presha*, 408 U.S. 942 (1972). Yet, notwithstanding the deletion of the death



penalty, the defendant would submit that the statute continues to be unconstitutional.

At the present time the penalty for first degree murder in New Jersey is life imprisonment, while the punishment for second degree murder is not more than 30 years in the State Prison. *N.J.S.A.* 2A:113-4. However, an accused is not indicted for either first or second degree murder, but rather for the crime of "murder," which encompasses both degrees. *State v. Williams*, 39 N.J. 471, 479, 189 A.2d 193, 197 (1963). Not until the jury renders its verdict does it designate the crime as being either first or second degree murder. *N.J.S.A.* 2A:113-2. Felony murder and premeditated murder are both considered murder in the first degree. *N.J.S.A.* 2A:113-2. Thus a defendant who goes to trial in a felony murder case and is convicted must receive the mandatory sentence of life imprisonment. *N.J.S.A.* 2A:113-4, *State v. Corbitt*, 74 N.J. 379, 378 A.2d 235 (1977); *State v. Robinson*, 139 N.J. Super. 58, 352 A.2d 587 (App. Div. 1976) certif. den. ____ N.J. ____ , ____ A.2d ____ (1977).

However, a defendant accused of felony murder may avoid this mandatory life sentence if he is willing to plead to the offense. *N.J.S.A.* 2A:113-3 provides in pertinent part:

> In no case shall the plea of guilty be received upon any indictment for murder. . .
>
> Nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment; the sentence to be imposed, if such plea shall be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

In sentencing a defendant who has pled *non vult* to the crime of murder, a judge is not to make a determination as

to the degree of the crime, but rather he has complete discretion to impose a term of not more than 30 years, the punishment for second degree murder, or life imprisonment, the penalty for first degree murder.[1] *State v. Walker*, 33 N.J. 580, 588, 166 A.2d 567, 571-72 (1957). Thus it is common for a defendant entering a *non vult* plea to set forth facts which would clearly indicate a first degree murder, but yet be sentenced to a term of years. See *e.g. State v. Hubbard*, 123 N.J. Super. 345, 351-52, 303 A.2d 87, 90 (App. Div. 1973), certif. den. 63 N.J. 325, 315 A.2d 413 (1973). On the other hand, if that defendant refuses to enter a plea but goes forward to trial and is convicted on the same facts, then he must receive a life sentence.

Therefore, even though the maximum sentence for murder is life imprisonment whether or not there had been a trial, the statute nevertheless penalizes the defendant who goes to trial by requiring that after conviction he must be sentenced by a judge who has no discretion to impose a sentence of less than life imprisonment. This statutorily imposed loss of discretion in the sentencing judge, which may mean the difference between a few years in the State Prison and life imprisonment, is a severe penalty for a defendant to pay simply because he has chosen to exercise his right to a jury trial. Obviously, a defendant in a felony murder case will be extremely reluctant to risk a trial when he can plead to the offense, admit the crime, and be eligible for a much lesser sentence. Thus, just as in *United States v. Jackson*, the statute involved here not only discourages a

[1]A plea of *non vult* or *nolo contendere* is the equivalent of a guilty plea except that it may not be used in a collateral proceeding for the same wrong. *In re Berardi*, 23 N.J. 485, 494, 129 A.2d 705, 710 (1957); *State v. Pometti*, 12 N.J. 446, 452, 97 A.2d 399, 402-03 (1953).



defendant from asserting his constitutional rights, it penalizes him if he does.

Since the *Jackson* decision it has been consistently held that a defendant may not be penalized through imposition of a more severe sentence simply because he has insisted upon a trial or has refused to acknowledge his guilt at sentencing. *Scott v. United States*, 419 F.2d 264, 268 (D.C. Cir. 1969); *Poteet v. Fauver*, 517 F.2d 393, 396 (3 Cir. 1975); *United States v. Derrick*, 519 F.2d 1, 3 (6 Cir. 1975); *United States v. Wiley*, 278 F.2d 500, 504 (7 Cir. 1960); *Hess v. United States*, 496 F.2d 936, 938 (8 Cir. 1974); *United States v. Stockwell*, 472 F.2d 1186 (9 Cir. 1973), *cert.* den. 411 U.S. 948 (1973); *People v. Young*, 20 Ill. App. 3d 891, 314 N.E.2d 280 (1974). This is true even if the penalty imposed is simply an increase in the minimum sentence. *Commonwealth v. Staley*, 229 Pa. Super. 322, 324 A.2d 393 (1974). Moreover, statutes which impose harsher sentences upon defendants convicted at jury trials have likewise been held unconstitutional in the wake of *Jackson.* See *Pope v. United States, supra; Funicello v. New Jersey, supra; Atkinson v. North Carolina*, 403 U.S. 948 (1971) rev'g *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241 (1969); *Thomas v. Leeke*, 403 U.S. 948 (1971) [rev'g *Thomas v. Leeke*, 257 S.C. 491, 186 S.E.2d 516 (1970)]; *Springfield v. United States*, 403 F.2d 572 (D.C. Cir. 1968). For example, in *People v. Courts*, 401 Mich. 57, 257 N.W.2d 101 (1977), a defendant convicted of a motor vehicle charge was sentenced to 30 days in jail, a $100 fine, and $154 in costs, even though under state law he would have received only a $15 fine if he had pled guilty. Noting that this statutory scheme might lead some judges to penalize defendants for requesting a trial, the Michigan Supreme Court reduced defendant's sentence to a $15 fine.

257 N.W.2d at 103. Similarly, in *Voyles v. Thorneycroft*, 398 F. Supp. 706, 707 (D. Ariz. 1975), an Arizona statute which provided that a defendant who pled guilty to drunken driving would have his driver's license returned to him, while a defendant who pled not guilty would remain under suspension, was held to impose an impermissible burden on the Fifth and Sixth Amendment rights of the accused.

In the present case it does not matter that a defendant in New Jersey who pleads *non vult* may possibly receive a life sentence. What is important is that the defendant who goes to trial must receive the maximum sentence simply because he has exercised his constitutional rights. In *United States v. McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970), a judge announced that he would impose the maximum sentence of life imprisonment on anyone convicted before him of armed robbery in a jury trial. Noting that the inevitable effect of this policy would be to deter the assertion of Fifth and Sixth Amendment rights, the District of Columbia Circuit found it to be in violation of *Jackson. Id.* The New Jersey murder statute places the same sort of burden on a defendant convicted at trial by taking away the judge's discretion to impose a term of less than life imprisonment, even if such a sentence is clearly warranted.[2]

[2]If defendant Corbitt had entered a *non vult* plea it is very likely that he would have received a much less severe sentence than life imprisonment. At the time of the crime the defendant was only 22 years old and he had no prior convictions. According to the Presentence Report, Mr. Corbitt was a high school graduate who left South Carolina in 1969 "to find a new job in a better town." Prior to his arrest the defendant was employed in Newark as a bartender. Moreover, it is clear that the defendant had no intention to harm the victim, Earl Redding. Rather, after having a series of disagreements with his landlord concerning rent payments, the defendant allegedly started a trash fire in his apartment building which led to Redding's death from smoke inhalation. (See Presentence Report)



The fact that the death penalty is no longer involved does not make such a sentencing scheme proper. It is recognized that "the penalty of death is qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and that the severity of the death penalty may require special concern for the rights of the condemned, *Furman v. Georgia*, 408 U.S. 238, 286-87 (1976), (Brennan, J., concurring). However, the defendant does not understand the *Jackson* decision to extend only to situations involving the death penalty. Rather, *United States v. Jackson* is merely one of a long line of cases in which this Court has held that neither courts nor legislatures may impose premiums on the exercise of constitutional rights.[3] *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Griffin v. California*, 380 U.S. 609, 614 (1965); *Malloy v. Hogan*, 378 U.S. 1, 8, (1964). The emphasis in all of these cases has been not on the degree of punishment possible under the applicable statute, but on the penalty placed upon the constitutional right. As this Court noted in *Spevack v. Klein*, 385 U.S. 511, 515 (1967),

> In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, [380 U.S. at 614], the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'

Thus, many of these cases invalidating statutes which

[3]An analogous line of cases has held that, where a state enacts statutes which open avenues of access to the courts, the Due Process Clause of the Fourteenth Amendment prohibits the state from then vindictively punishing those persons who exercise their rights under the statute. See *Blackledge v. Perry*, 417 U.S. 21, 25 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969).

burdened the exercise of constitutional rights have been concerned with civil, not criminal penalties. See *e.g., Dunn v. Blumstein, supra* [durational residence laws penalize right to travel]; *Gardner v. Broderick,* 392 U.S. 273 (1968) [dismissal of policeman who invokes right against self-incrimination violates Fifth Amendment]; *Harman v. Forssenius,* 380 U.S. 528 (1965) [certificate of registration in lieu of poll tax infringes upon right to vote]. Moreover, none of the criminal cases cited above have limited *Jackson* to death penalty situations. Certainly, the threat of a mandatory life sentence which is present in this case is at least as severe a burden on defendant's right to jury trial as, for example, the filing of a certificate was upon the right to vote in *Harman v. Forssenius, supra.*

Indeed, in two recent decisions this Court has inferred that in the proper circumstances it would apply *Jackson* in noncapital cases. For example, in *Ludwig v. Massachusetts,* 427 U.S. 618 (1976), this Court upheld a "two tier" system by which a defendant accused of certain crimes could receive a more severe sentence if, after having been convicted in a non-jury trial, he insisted upon a trial *de novo* before a jury. Yet, the majority opinion written by Mr. Justice Blackman was careful to distinguish *Jackson* by noting that since the same range of penalties was available at both tiers, no burden was placed upon the right to a jury trial. *Id.* at 627, n.4. In another decision, *Middendorf v. Henry,* 425 U.S. 25 (1976), the Court noted that, while it is permissible under the Uniform Code of Military Justice for a person to be subject to harsher penalties because he has requested counsel and a formal court martial, in a civilian context this same scheme would call into play the reasoning of *United States v. Jackson* that one cannot be penalized for exercising a constitutional right. *Id.* at 48, n.25. Thus it is clear that the



basic rationale of the *Jackson* decision should extend to any case where a defendant receives a significant penalty for exercising his constitutional rights, even though the criminal sanction involved might be relatively minor. *Cf. United States v. Rivera,* 427 F. Supp. 89, 92 (S.D.N.Y. 1977).

Having established that the defendant was in fact penalized for exercising his right to trial, the question that remains is whether there is a need for this type of statute or whether, in the words of *United States v. Jackson,* 390 U.S. at 582, it is "unnecessary and therefore excessive." In its opinion below the Supreme Court of New Jersey found a need for the sentencing scheme of *N.J.S.A.* 2A:113-1 *et seq.* in that ". . . encouragement of guilty pleas is at the very heart of an effective plea negotiation program." *State v. Corbitt, supra,* 74 N.J. at 396, 378 A.2d at 243-44. Yet, while encouragement of plea bargaining may be a valid governmental interest, there is simply no "need" to give a convicted defendant the maximum sentence simply because he has chosen to go to trial. This mandatory maximum sentence imosed upon a jury conviction merely serves to coerce a defendant not to assert his constitutional rights. Moreover, it is clear that plea bargaining can work without this type of discriminatory sentencing provision. Although the murder statute is the only New Jersey law which provides a separate scale of punishment for those who have gone to trial, plea bargaining is an accepted and widespread practice within the state. See *State v. Gibson,* 68 N.J. 499, 505-06, 348 A.2d 769, 772 (1975); *State v. Thomas,* 61 N.J. 314, 321, 294 A.2d 57, 61 (1972). Other states have not been forced to rely on this sort of sentencing provision in order to conduct plea bargaining in homicide cases, and inded, there appear to be few if any statutes in any jurisdiction which provide separate

punishments for those defendants who plead guilty and those who go to trial.[4] Rather, most statutes of this sort have been declared unconstitutional since the *Jackson* decision.[5] *Funicello v. New Jersey, supra*; *Voyles v. Thorneycroft, supra*; *People v. Courts, supra.* Thus, in view of the uniqueness of the sentencing provision of the New Jersey murder statute, any claim that it is "necessary" to plea bargaining must fall on its face.

Plea bargaining has, of course, been recognized as an accepted and useful tool in the administration of criminal justice. *Blackledge v. Allison,* 431 U.S. 63, 71 (1977); *Santobello v. New York,* 404 U.S. 257, 260 (1971). In a true plea bargaining situation both sides benefit; the defendant may limit his possible sentence exposure, while the

[4]The death penalty statutes approved by this Court in the last few years all appear to provide the same range of punishments, whether the conviction is a result of a guilty plea or a jury trial. See *Gregg v. Georgia,* 428 U.S. 153 (1976); *Proffit v. Florida,* 428 U.S. 242 (1976); *Jurek v. Texas,* 428 U.S. 262 (1976).

But see *State v. Weind,* 50 Ohio St. 224, 364 N.E. 2d 224 (1977), which involved the validity of the Ohio murder statute. Although that statute provided for the same range of penalties after a plea or trial, the defendant challenged its constitutionality because upon a guilty plea a judge could dismiss any aggravating circumstances, thus sparing the accused the death penalty. Noting that "... the United States' Supreme Court has never proscribed discretionary acts of mercy," the Supreme Court of Ohio upheld the statute. 364 N.E.2d at 229.

[5]Of course, in situations where there is no right to a jury trial, a state would be allowed to enact separate penalty provisions for persons who do not insist upon a formal hearing. For example, in *Raines v. Alabama,* 552 F.2d 660 (5 Cir. 1977), the Alabama Youthful Offender Act, which required a juvenile to waive a jury trial before getting the benefit of the act, was held constitutional since, pursuant to *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), there is no right to jury trial in juvenile proceedings. *Cf. Middendorf v. Henry, supra,* 425 U.S. at 48, n. 25.



State gains a prompt adjudication of guilt without the expense of a trial. *Brady v. United States,* 397 U.S. 742, 752 (1970). Accordingly, the defendant has no desire to restrict the practice in any manner. But it is the defendant's position that plea bargaining has nothing to do with the present case. Rather, plea bargaining is "a process of negotiation in which the prosecutor offers the defendant certain concessions in exchange for a guilty plea." Note, "The Unconstitutionality of Plea Bargaining" 83 Harv. L. Rev. 1387, 1389 (1970). These concessions may take the form of a recommendation of a lesser maximum sentence, a plea to a reduced charge, dismissal of other pending charges, or even, as this Court recently held, a promise not to indict under a habitual offender statute. *Bordenkircher v. Hayes,* ____ U.S. ____, ____, 98 S. Ct. 663, 668 (1978). During plea bargaining negotiations, in which both sides have relatively equal bargaining power, the State is free to use whatever leverage it might have to persuade the defendant to forego his right to trial. But at the same time the defendant retains his freedom of choice; if he turns down the bargain, he cannot be penalized by imposition of a harsher term at sentencing.

In *Bordenkircher v. Hayes, supra,* Mr. Justice Stewart, writing for the majority, compared the "give and take negotiation common in plea bargaining. . ." with ". . . the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise his legal rights. . ." ____ U.S. at ____, 98 S. Ct. at 667. Even though the prosecutor's aim in plea bargaining is to convince the defendant to give up his right to trial, as long as the accused is free to accept or reject the offer, there is no element of retaliation or punishment. ____ U.S. at ____, 98 S. Ct. at 668. On the other hand, "[t]o

punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id.* This distinction highlights the problem with the mandatory life sentence provision of the New Jersey murder statute. A defendant in a felony murder case in New Jersey is not encouraged to plead *non vult* by the offer of a limited sentence exposure or other concessions. Instead, he is coerced into pleading to the offense by the threat of the mandatory life sentence which is automatic upon a jury conviction. Thus the murder statute does not contain the "mutuality of advantage" common to plea bargaining, *Brady v. United States, supra,* 397 U.S. at 752, nor does it aid bargaining or negotiation. The mandatory life sentence is simply a penalty levied against those persons who refuse to plead guilty. As such, it imposes the same sort of vindictive punishment as did the judge in *United States v. McCoy, supra,* who threatened to give life sentences to any defendant convicted before him at a trial.

It has often been said that the criminal justice system is replete with the making of difficult judgments and that, while a defendant may have the right to follow whatever course he desires, the Constitution does not forbid him from choosing. *Chaffin v. Stynchcombe,* 412 U.S. 17, 30 (1973); *McGautha v. California,* 402 U.S. 183, 213 (1971); *McMann v. Richardson,* 397 U.S. 759, 769 (1968). But at the same time a state may not force choices upon a defendant where the only objective of the state practice is to deter the assertion of protected rights. *Chaffin v. Stynchcombe, supra,* 412 U.S. at 32, n.20. As this Court noted in *McGautha v. California, supra,* 402 U.S. at 213, the "threshold question" is whether compelling an election between two alternatives "impairs to any appreciable extent any of the policies involved."

Using this standard, the New Jersey murder statute quite



clearly impairs the right to a jury trial. In a normal situation there is, of course, a degree of inherent coercion in the decision whether to plead guilty, for it is common for judges to extend leniency to the defendant who admits his guilt. *Brady v. United States, supra,* 397 U.S. at 752; *State v. Forcella, supra,* 52 N.J. at 276, 245 A.2d at 187. Yet, a defendant who goes to trial pays no penalty for exercising his rights since, if convicted, he is still eligible to receive any sentence allowed by the statute. But in New Jersey a defendant in a felony murder case knows that in order to get a jury trial, he must forfeit the opportunity to receive a sentence of less than life imprisonment. Certainly, this situation does not reflect the inherent coercion of the criminal justice system, nor does the defendant have the freedom of choice contemplated by cases such as *Chaffin v. Stynchcombe, Colten v. Kentucky,* 407 U.S. 104 (1972), or *McGautha v. California.* Rather, the mandatory life sentence provision of the New Jersey murder statute is a unique and vindictive penalty imposed only upon those defendants who have exercised their constitutional right to a jury trial. As such the defendant would submit that it imposes an intolerable burden upon one's Fifth and Sixth Amendment rights.

## II.
## THE SENTENCING PROVISION OF THE NEW JERSEY MURDER STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY ESTABLISHING SEPARATE SCALES OF PUNISHMENT FOR THE SAME OFFENSE DEPENDING ON WHETHER THE ACCUSED HAS EXERCISED HIS RIGHT TO A TRIAL.

As noted, the New Jersey murder statute has two scales of punishment for the same offense. If a defendant pleads *non vult* and admits a felony murder, he may be sentenced to not more than 30 years in prison or to life imprisonment. But if that person is convicted of felony murder after a trial, he receives the mandatory sentence of life imprisonment.[6] It is submitted that this scheme of different punishments for the same offense, based solely on whether the defendant has gone to trial, violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause does not prevent a state from classifying persons into separate groups, it merely requires that such classifications be reasonably related to a permissible state purpose. *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 17 (1973); *McGinnis v. Royster,* 410 U.S. 263, 270 (1973); *Dandridge v. Williams,* 397 U.S. 471, 487 (1970). But where the nature of a statutory classification is such that it discriminates against those persons who have exercised a fundamental constitutional right, the Equal Protection Clause requires that there be a "compelling state interest" to justify the classification. *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 256-58 (1974); *Dunn v. Blumstein, supra,* 405 U.S. at 337-39; *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). This "compelling interest" test is applicable even where a classification has not been shown to deter the exercise of the constitutional right, but merely serves to penalize it. *Dunn v. Blumstein, supra,* 405 U.S. at 339-40; *Shapiro v. Thompson, supra,* 394 U.S. at 634.

[6]The State had argued below that there was a difference between a conviction for "murder" and a conviction for felony murder. 74 N.J. at 400, 378 A.2d at 246. The Supreme Court of New Jersey did not find this to be a "fully satisfactory basis for meeting the defendant's argument," and thus chose to address the question more directly. 74 N.J. at 401, 378 A.2d at 246. In any event, this distinction would not matter in the present case. Although *N.J.S.A.* 2A:113-2 requires a jury returning a guilty verdict to "designate by their verdict whether it be murder in the first degree or in the second degree," *State v. Greely,* 11 N.J. 485, 489-91, 95 A.2d 1, 3-4 (1953), the jury in the present case simply found appellant guilty of "murder." Of course, since the case was tried on a felony murder basis, the conviction was deemed to be one of first-degree murder.



In its opinion below, the Supreme Court of New Jersey held that the "compelling state interest" test was inapplicable in this case. *State v. Corbitt, supra,* 74 N.J. at 401, 378 A.2d at 246. Rather, the court found that

> . . . in the area of classification of criminal or penal offenders for purposes of penalty or punishment the Legislature may provide for differences of treatment as long as there is some rational connection between the classification and a proper legislative purpose. *Id.*

Because the murder statute served to "ameliorat[e] the rigor of life imprisonment for those . . . willing to acknowledge their crime," to "facilitat[e]. . . plea negotiations in homicide cases," and to "conserv[e] . . . scarce judicial and prosecutorial resources . . . ," it was held to be rationally related to legitimate state goals. 74 N.J. at 402, 378 A.2d at 246-47.

But the defendant would submit that, since the classification here infringes upon the exercise of a valued constitutional right, the "compelling state interest" test should be applied. Quite clearly the murder statute does not classify defendants according to their personal or penal status, but on whether they have exercised their constitutional right to a jury trial. A defendant convicted of first degree murder at a jury trial receives a mandatory life sentence, while a defendant whose convictions rests upon a plea is eligible for a term of years in the State Prison.

Moreover, it is equally clear that the right to a jury trial is "fundamental to the American system of justice." *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968). Indeed, within the right to a jury trial are included the rights to remain silent, *Malloy v. Hogan, supra,* 378 U.S. at 6, to confront one's accusers, *Pointer v. Texas,* 380 U.S. 400, 403 (1965), to present witnesses in one's defense, *Washington v. Texas,* 388 U.S. 14, 19 (1967), to be represented by counsel, *Gideon v. Wainwright,* 372 U.S. 335, 342 (1963), and to be convicted by proof beyond a reasonable doubt, *In re Winship,* 397 U.S. 358, 364 (1970), all of which have been recognized as being fundamental rights. *Duncan v. Louisiana, supra,* 391 U.S. at 148-50. Thus, use of the "rational relationship" test would be totally inappropriate in the present situation.

The question that remains is whether New Jersey has a "compelling interest" in maintaining this sort of discriminatory sentencing provision. Certainly, none of the reasons advanced by the Supreme Court of New Jersey to justify the provision could be considered compelling. While it is commendable that the statute serves to "ameliorat[e] the rigor of life imprisonment for those . . . willing to acknowledge their crime," the State has no compelling interest in not extending the same sentencing alternatives to persons convicted at trial. Although the statute may serve to "facilitat[e] plea negotiations in . . . homicide cases," such a disparate scheme is clearly not necessary to plea bargaining. The fact that the statute may "conserv[e]. . . scarce judicial and prosecutorial resources" is irrelevant since expense has never been recognized as a justification for limiting the constitutional protections. *Griffin v. Illinois,* 351 U.S. 12, 18 (1956).



Yet, even if this Court is to apply the rational relationship test, the defendant would still submit that the statute must fall. Of course, a state may provide for differences in treatment of penal offenders if it has a rational basis for so doing. *McGinnis v.Royster, supra.* Generally, the courts have found a rational basis for differences in treatment where the classifications involved are based upon the personal or penal status of the offender. See *e.g. Oyler v. Boles,* 368 U.S. 448, 455-56 (1962); *Finley v. California,* 222 U.S. 28, 31 (1911); *State v. Fearick,* 69 N.J. 32, 38, 350 A.2d 227, 230 (1976) [mandatory jail sentence imposed upon only those suspended drivers involved in auto accidents resulting in personal injuries]; *State in the Interest of K.V.N.,* 116 N.J. Super. 580, 283 A.2d 337 (App. Div. 1971), aff'd 60 N.J. 517, 291 A.2d 577 (1972) [juvenile offenders may receive longer sentences than those prosecuted as adults]. However, where the classification is based upon "unreasoned distinctions" such as the offender's financial status, then the Equal Protection Clause is violated. *Mayer v. Chicago,* 404 U.S. 189, 195-96 (1971); *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966). See also *People v. Calvaresi,* 188 Colo. 277, 534 P.2d 316 (1975); *City of Aberneen v. Meidinger,* 233 N.W. 2d 331 (S.D. 1975); *Olsen v. Delmore,* 48 Wash. 2d 545, 295 P.2d 324 (1956).

In *Pruett v. Texas,* 468 F.2d 51 (5 Cir. 1972), aff'd *en banc* 470 F.2d 1182 (1973), aff'd mem. *sub nom Texas v. Pruett,* 414 U.S. 802 (1973), a defendant challenged a Texas statute which operated to deny "good time" credit for those prisoners who had chosen to appeal their convictions. The Fifth Circuit held, and this Court agreed, that the Equal Protection Clause did not allow the State of Texas to impose such a premium upon a defendant's right to appeal. 468 F.2d

at 55. Since that state had provided a process by which defendants could appeal their convictions, it was required to keep that process free of "unreasoned distinctions" which could "only impede open and equal access to the courts." *Id.* at 56. Because the denial of good time credits served to penalize a prisoner's right to appeal, the statute was held to be in violation of the Fourteenth Amendment. *Id.*

The New Jersey murder statute relies on this same sort of "unreasoned distinction" in imposing different penalties for felony murder, depending upon whether the conviction is a result of a plea of *non vult* or a jury trial. Even if one is to accept the contention that the defendant who pleads to the offense is a more fit subject for rehabilitation and thus may be treated more leniently, *State v. Poteet,* 61 N.J. 493, 496-97, 295 A.2d 857, 859 (1972), it does not follow that the defendant who insists upon his constitutional rights must be so recalcitrant that only the maximum sentence would be appropriate. Rather, since a defendant who pleads *non vult* in a felony murder case is every bit as culpable as the defendant convicted after a trial, there is no reason why both should not at least be eligible for the same range of sentences. Certainly there is no legitimate state purpose in discouraging trials, nor is there a rational basis for discriminating against those who have exercised their constitutional rights. Thus, in the absence of either a compelling state interest or a rational basis to justify the discriminatory sentencing provisions of *N.J.S.A.* 2A:113-1 to 4, the defendant would submit that it stands in violation of the Fourteenth Amendment.



## CONCLUSION

For the foregoing reasons the appellant respectfully requests that the decision of the Supreme Court of New Jersey be reversed.

Respectfully submitted,

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# ADDENDUM

## UNITED STATES CONSTITUTION

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.



Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-5903**

McARTHUR CORBITT,

*Appellant,*

v.

STATE OF NEW JERSEY,

*Appellee.*

**On Appeal from the Supreme Court of New Jersey**

## BRIEF FOR APPELLEE

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IN THE

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OCTOBER TERM, 1974

**No. 77-5903**

McARTHUR CORBITT,

*Appellant,*

v.

STATE OF NEW JERSEY,

*Appellee.*

**On Appeal from the Supreme Court of New Jersey**

## BRIEF FOR APPELLEE

### Questions Presented[1]

1. Whether the New Jersey statutory scheme for murder needlessly discourages a defendant's Sixth Amendment right to a jury trial and Fifth Amendment right to plead

[1] Appellee omits reference to the Opinions Below, Jurisdiction, Statutes, and Constitutional Provisions Involved since these items have been correctly presented in appellant's brief.

not guilty where its sentencing provisions provide only for a sentence of life imprisonment after a conviction by trial of first degree murder while one who pleads *non vult* to murder may be eligible for a term of life imprisonment or a lesser sentence.

2. Whether the difference in potential minimum sentences between that upon conviction of first degree murder after trial and that upon a plea of *non vult* to murder is consistent with the Equal Protection Clause.

## Statement of the Case

On May 11 and 13, 1972, fires occurred at a Newark multi-family dwelling. A visitor at the premises died from smoke inhalation because of the second fire. Appellant McArthur Corbitt, confessed to setting both fires to obtain revenge against his landlord. As a result of these incidents, appellant was indicted for two counts of arson and one count of murder. (A. 2, 3). On April 10, 1973, a jury acquitted appellant of arson in relation to the May 11 fire but found him guilty of arson in connection with the May 13 fire and of murder of the visitor. (A. 5). The murder charge had been tried on a felony murder theory. On May 16, 1973, the mandatory sentence of life imprisonment was imposed on the first degree murder conviction and a concurrent five to seven year prison sentence was imposed for the arson. (A. 5, 8).

A Notice of Appeal to the Superior Court of New Jersey, Appellate Division, was filed on July 31, 1973. (A. 8, 9). On September 23, 1975, the Superior Court, Appellate Division, in an unreported opinion, affirmed the conviction of felony-murder but vacated that for arson on grounds of merger. (A. 9-12). A subsequent Petition for



Certification to the Appellate Division was filed in the New Jersey Supreme Court and was granted on February 18, 1976. The certification was "limited to the question of the validity of the mandatory life sentence upon a jury conviction for murder. . . ." (A. 13).

Appellant argued before the New Jersey Supreme Court that the sentencing scheme of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 infringed upon his Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial, and deprived him of equal protection under the Fourteenth Amendment. The New Jersey Supreme Court, by a five to two majority, found the sentencing scheme to be constitutional and affirmed the conviction.[2] Specifically, the Court held that the authority of *United States* v. *Jackson*[3] is confined to the case of a choice between trial and plea of guilt when a possible consequence of the former, and only of the former, is the death penalty. The Court further concluded that even if *Jackson* were applicable, "any encouragement or inducement of a defendant to plead *non vult* under our statute and thereby waive his right to trial is not the result of a needless or unnecessary procedural device but a highly useful and desirable one, and the encouragement is therefore not an impermissible infringement on defendant's Fifth Amendment rights."[4] The Court also found that the statutory scheme did not violate the Fourteenth Amendment's Equal Protection Clause.

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[2] *State* v. *McArthur Corbitt*, 74 N. J. 379, 378 A.2d 235 (1977).

[3] 390 U.S. 570 (1968).

[4] 74 N. J. at 400, 378 A.2d at 245.

A Notice of Appeal to this Court was filed in the New Jersey Supreme Court on November 30, 1977. (A. 51). On February 21, 1978, this Court noted probable jurisdiction. (A. 53).

## Summary of Argument

Appellant, McArthur Corbitt, was convicted by a jury of first degree murder. Consequently, the trial court imposed the mandatory sentence of life imprisonment.[5] Had he chosen to plead *non vult* to the indictment charging murder generally,[6] and had the court accepted the plea, appellant would have been eligible for a lesser sentence. Although after pleading *non vult* to murder a defendant may be sentenced to life imprisonment, the New Jersey statutes specifically authorize the trial court to impose a lesser sentence not to exceed thirty years.[6a] At issue is whether the possibility of receiving a "lesser term" by entering a plea of *non vult* unnecessarily exacts a penalty with regard to an accused's assertion of his Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.

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[5] See N.J.S.A. 2A:113-4; *State* v. *Funicello,* 60 N. J. 60, 286 A.2d 55 (1972), *cert. den. sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972); *State* v. *Robinson,* 139 N. J. Super. 58, 352 A.2d 587 (App. Div. 1975).

[6] See N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4. In New Jersey a "short form" murder indictment charges that offense generally, and therefore the indictment encompasses first degree, second degree and manslaughter. *State* v. *Konigsberg,* 33 N. J. 367, 164 A.2d 740 (1960).

[6a] *Id.*



It is the position of the State of New Jersey that the sentencing scheme of our murder statutes does not needlessly chill assertion of those rights guaranteed by the Fifth and Sixth Amendments, nor does it penalize those who elect to contest their guilt before a jury. The penalty of life imprisonment is not contingent upon an accused's decision to defend against the charges which have been brought. Similarly, a plea of *non vult* does not assure a lesser sentence than that mandated following a conviction of first degree murder by a jury. Since the maximum potential punishment is the same regardless of whether the case is disposed of by jury trial or by plea of *non vult,* the statutes impose no burden on the exercise of an accused's constitutional rights.

Appellant's assertion to the contrary is not supported by the authority of *United States* v. *Jackson*[7] upon which he heavily relies. The bargain or inducement offered the defendant by operation of the Federal Kidnapping Statute in *Jackson* and which this Court found to be unconstitutional concerned avoidance of the death sentence which could be imposed only upon conviction after a jury trial. In the situation presented here, however, the inducement consists merely of the possibility of a sentence less than life imprisonment. That *Jackson* is limited to the clear cut choice between avoiding and risking the death penalty is clear. The threat of capital punishment has a special constitutional significance. Its chilling effect is so great as to be qualitatively different from the threat of a longer sentence.

A broader interpretation of *Jackson* to preclude all inducements to a defendant to plead guilty would seriously implicate the widespread practice of plea negotiating in

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[7] 390 U.S. 570 (1968).

which a defendant pleads guilty in exchange for a promise of conviction on a lesser offense, the dropping of a particular charge against him or the recommendation of a lighter sentence. Yet, this Court in *Jackson* recognized this implication as undesirable and therefore took a narrower view. The decision emphasized that allowing uncoerced guilty pleas was a legitimate congressional objective as part of the task of maintaining flexibility in the criminal process.[8] This Court, on subsequent occasions, has reiterated its strong approval of the practice of plea bargaining—a practice which, in effect, encourages the defendant to waive many of his constitutional rights for the benefit of a lesser sentence. If it is permissible, in plea bargaining, to induce a defendant to plead guilty and waive his right to trial, *a fortiori* no substantial constitutional question is presented when a legislature offers the possibility of a lesser sentence upon rendition of a plea of *non vult*.

*Jackson* did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that may have the effect of discouraging the exercise of constitutional rights. The question rather is whether the chilling effect is unnecessary and therefore excessive.[9] Thus, even if it is assumed that a burden is imposed by New Jersey's sentencing scheme for murder, it can hardly be said that a defendant is "needlessly" encouraged to plead *non vult*. In short, any encouragement is inconsequential and, in any event, is reasonably related to a proper governmental goal. While it is true that no man should be subject to

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[8] *United States* v. *Jackson, supra,* 390 U.S. at 584-85.

[9] *Id.* at 582.



an enhanced penalty only because he defends against a charge, it does not follow that an accused who frankly acknowledges his guilt should not be given consideration on that account. The concept that one who confesses is a better prospect for rehabilitation has long been accepted by our courts. Further, one who candidly admits his guilt should not, by virtue of that fact, be denied leniency. So called "plea bargaining," which in part is premised upon the idea that a defendant who confesses is entitled to some degree of compassion, has respectable support in New Jersey and throughout the country. It would be specious to contend that the Fifth Amendment bars a potentially less severe punishment upon an admission of guilt.

The sentencing scheme of our murder statutes not only serves the interests of defendants but those of the State as well. The State derives significant benefits from the conservation of limited prosecutorial and judicial resources and the expeditious attainment of penal objectives. Thus, the substantial benefits accruing to the State as well as to the generality of criminal defendants constitute a legitimate "need" for the encouragement of guilty pleas within the permissible limits of the *Jackson* standard. We therefore submit that the New Jersey murder statutes do not infringe upon an accused's Fifth and Sixth Amendment rights and do not "needlessly" and "unnecessarily" penalize those who elect to proceed to trial.

Appellant's equal protection argument is also devoid of merit. The claim of a denial of equal protection is based on the contention that the sentencing scheme of N.J.S.A. 2A:113-3 and 4 has the effect of separating persons who have committed first degree murder into two classes—those who go to trial and those who plead *non*

*vult*—and of treating the former class differently and discriminatorily as to punishment without a compelling state justification for the difference in treatment. At the outset, we note that the values underlying the equal protection clause are not implicated here since our murder statutes do not create differently treated classes. Rather, they merely offer all murder indictees a choice. The defendant must determine whether to place himself in one "class" or the other. The right to jury trial is not discriminatory but made available to all defendants. Once the election is made, the penal consequences in either case depend upon a combination of variables peculiar to each individual situation. Thus it cannot be said that the State has invidiously classified those who choose to stand trial.

In any event, our murder statutes do not provide disparate punishments for "the same offense." Those indictees who plead *non vult* are guilty of a different crime than those defendants who have been convicted of first degree murder after a jury trial. The crime identified by a conviction of first degree murder is distinct from the undifferentiated crime of murder, as stated in the formal indictment, which will support convictions of first or second degree murder or manslaughter. Therefore, acceptance of a *non vult* plea constitutes conviction of a different crime from first degree murder and may be treated differently.

Even assuming that our statutes establish a "classification" and provide disparate punishments for "the same offense," we submit that New Jersey's sentencing scheme for murder is constitutional under either the "rational relationship" test or the "compelling state interest" formula. Our murder statutes have a legitimate purpose and serve a compelling state interest. The State's interest is not in dealing more harshly with the defendant con-



victed by a jury of first degree murder but rather in ameliorating the rigor of life imprisonment for those offenders who are willing to acknowledge their crime and assume responsibility for their conduct. Thus the potential punishment under our statutes with the concomitant possibility of leniency is reasonably and necessarily related to the governmental goal of promoting rehabilitation. This goal, as well as those purposes associated with economy and expedition in criminal justice administration is advanced by our sentencing scheme for murder.

Since the penalty provisions of N.J.S.A. 2A:113-3 and 4 are reasonably and necessarily related to proper governmental objectives and serve compelling state interests, we respectfully submit that the guarantee of equal protection is in no way infringed by these statutes.

## *LEGAL ARGUMENT*

### POINT I

**The sentencing provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 do not place an unconstitutional burden upon a defendant's right to contest his guilt before a jury.**

It is well established that the State may not exert an unnecessary price for the assertion of a constitutional right.[10] Thus, for example, this Court has held that state-

[10] See, *e.g.*, *United States* v. *Jackson*, 390 U.S. 570 (1968); *cf. Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniform Sanitation Men* v. *Sanitation Comm'r*, 392 U.S. 280 (1968); *Spevack* v. *Klein*, 385 U.S. 511, 515 (1967); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Griffin* v. *California*, 380 U.S. 609 (1965). See also Note, "Another Look at Unconstitutional Conditions," 117 U. Pa. L. Rev. 144 (1968).

ments obtained during the course of disciplinary investigations under the threat of dismissal from public office cannot be used as evidence in a subsequent criminal prosecution.[11] So too, statutes voiding public contracts entered into by one who has asserted the Fifth Amendment privilege against self-incrimination have been held to be constitutionally infirm.[12] In a similar vein, this Court has condemned the practice of mandatorily disbarring attorneys based upon their exercise of the Fifth Amendment right to remain silent.[13] In these and other contexts, it was held that the law may not place a premium on the assertion of a valued constitutional right.[14]

This much conceded, it is equally clear that our Constitution does not serve to insulate those accused of criminal conduct from the necessity of making delicate choices.[15] The criminal process, like the rest of the legal system, "is replete with situations requiring the making of difficult judgments as to which course to follow."[16] The defendant in a criminal trial "is frequently forced

[11] See *e.g., Garrity* v. *New Jersey, supra.*

[12] *Lefkowitz* v. *Turley, supra.*

[13] *Spevack* v. *Klein, supra.*

[14] See *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *United States* v. *Derrick*, 591 F.2d 1 (6 Cir. 1975); *Hess* v. *United States*, 496 F.2d 936 (8 Cir. 1974).

[15] See *e.g., Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973); *McGautha* v. *California*, 402 U.S. 183 (1971); *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970). *Cf. Colten* v. *Kentucky*, 407 U.S. 104 (1972).

[16] *McGautha* v. *California, supra* at 213.



to testify himself and to call other witnesses in an effort to reduce the risk of conviction."[17] So too, when an accused presents witnesses at trial, he must reveal their identity and submit them to cross-examination which, in itself, may prove incriminating or may furnish the prosecution with a strong rebuttal evidence.[18] That the defendant faces such a dilemma "has never been thought an invasion" of his constitutional rights.[19] The threshold question is whether compelling the election impairs to an appreciable extent any of the policies underlying the rights involved.[20] Hence, the inquiry must focus upon whether the New Jersey murder statutes' sentencing scheme "unnecessarily" places a burden upon the accused's assertion of his constitutional right to defend against a criminal charge.[21] Resolution of this issue requires examination of the nature and gravity of the choice confronting a defendant charged with murder.

**A. No penalty is imposed upon one who chooses to defend against a murder charge since the punishment upon conviction is identical to the maximum sentence which may be imposed on one who pleads non vult.**

Appellant argued below that one accused of murder is faced with the "grisly" choice between contesting the State's charges, thus assuring a penalty of life imprison-

[17] *Williams* v. *Florida*, 399 U.S. 78, 83 (1970).

[18] *Id.* at 83-84.

[19] *Id.*, at 84; *State* v. *Corbitt*, 74 N. J. 379, 398, 378 A.2d 235, 245 (1977).

[20] *McGautha* v. *California, supra*, 402 U.S. at 213.

[21] *State* v. *Corbitt, supra*, 74 N. J. at 397, 378 A.2d at 244.

ment if convicted of first degree murder, and pleading *non vult* with the attendant potential of being sentenced to a lesser term of years. It is argued that such a grave choice exacts a penalty with regard to those who wish to exercise valued constitutional rights.

In support of this claim, appellant heavily relies upon *United States* v. *Jackson*.[22] There, this Court declared invalid the death penalty provision of the Federal Kidnapping Act because it "unnecessarily" and "needlessly" burdened the defendant's right to contest the prosecution's charges before a jury. That statute provided that capital punishment could be imposed only upon a jury's recommendation which was binding on the trial court.[23] A defendant could be assured of avoiding the death penalty only by waiving a jury trial or entering a guilty plea. This Court reasoned that since the defendants could avoid the death penalty only by pleading guilty or proceeding to trial before a judge, they were "needlessly encourage[d]" to waive their basic rights both to contest guilt and to do so before a jury.[24] While recognizing the State's legitimate interest in jury-imposed capital punishment, the Court found that there were other means available which would subject all defendants to an equal risk of death and thereby eliminate the "unnecessary" and "excessive" burden upon defendants who desired a jury trial.[25]

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[22] 390 U.S. 570 (1968).

[23] 18 U.S.C.A. §1201(a).

[24] 390 U.S. at 583.

[25] *Id.* at 582.



As a result of the decision in *Jackson*, grave doubts were generated with respect to the validity of statutes which permitted a criminal defendant to avoid capital punishment by foregoing a jury trial. Like the Federal Kidnapping Act, the New Jersey murder statutes provided that only a jury could impose the death penalty.[26] However, our statutory scheme differed because a defendant could not be tried by a judge. Furthermore, acceptance of a plea of *non vult*, by which a defendant could escape the possibility of facing death, was discretionary with the trial court.[27] In *State* v. *Forcella, supra*, the New Jersey Supreme Court held that the Sixth Amendment challenge was meritless because the New Jersey statute required trial by jury in all cases in which the accused contested his guilt.[28] As for the claim that the Fifth Amendment was violated, the majority reasoned that acceptance of a plea of *non vult* was discretionary with the trial judge, and thus the impermissible encouragement to plead guilty that existed under the Federal Act was not present under the New Jersey statutes.[29] The majority further reasoned that the *non vult* plea was enacted pursuant to a valid governmental interest to provide lenity for those who were willing to admit their guilt.[30] The New Jersey Supreme Court, therefore, up-

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[26] *State* v. *Forcella*, 52 N. J. 263, 245 A.2d 181 (1968), rev'd and rem. *sub nom. Funicello* v. *State*, 403 U.S. 948 (1971), appeal after remand 60 N. J. 60, 286 A.2d 55 (1972), *cert. den. sub nom. New Jersey* v. *Presha*, 408 U.S. 942 (1972).

[27] *Id.* at 270-71, 245 A.2d at 184-85.

[28] *Id.* at 272, 245 A.2d at 185.

[29] *Id.* at 279-80, 245 A.2d at 189-90.

[30] *Id.* at 275, 245 A.2d at 187.

held our capital penalty provision in recognition that it constituted nothing more than a form of plea bargaining by allowing consideration to be given to the accused who admits his guilt.[31]

This Court, however, summarily reversed and remanded the matter three years later.[32] On remand, the New Jersey Supreme Court struck the capital penalty provision.[33] It ruled that in all future cases, those found guilty of first degree murder by a jury would be sentenced to a mandatory term of life imprisonment and that the penalty provisions applicable upon a plea of *non vult* would remain intact.[34]

Hence, in 1972 the New Jersey Supreme Court provided the framework under which the murder statutes were to be applied and administered. Accordingly, a defendant who proceeds to trial faces the possibility of receiving a life sentence if found guilty of first degree murder. He may also be found guilty of second degree murder, in which case he faces a maximum exposure of 30 years imprisonment,[35] or manslaughter, in which event he faces a maximum sentence of ten years.[36] He may also be acquitted. A defendant who pleads *non vult* to an indictment which generally charges murder may receive a sentence of life imprisonment. The court may, however, impose a maximum term of 30 years.[37]

[31] *Id.* at 275-76, 245 A.2d at 187.

[32] *Funicello* v. *New Jersey*, 403 U.S. 948 (1971).

[33] *State* v. *Funicello*, 60 N. J. 60, 286 A.2d 55 (1972), *cert. den. sub nom. New Jersey* v. *Presha*, 408 U.S. 942 (1972).

[34] *Id.* at 68, 286 A.2d at 59.

[35] N.J.S.A. 2A:113-4.

[36] N.J.S.A. 2A:113-5.



It is manifest that the sentencing scheme of the New Jersey murder statute is fundamentally different from that struck down in *United States* v. *Jackson, supra.* As noted previously, this Court found it constitutionally offensive to subject only those who contested their guilt before a jury to a greater penalty than all other similarly situated individuals who elected to contest the State's charges. The defect in the Federal Kidnapping statute was the possibility of a greater punishment contingent only upon the exercise of the constitutional right to trial by jury. By contrast, under the New Jersey statutes, the defendant faces exactly the same maximum sentence exposure. Whether he proceeds to trial or enters a plea of *non vult,* he cannot absolutely avoid the potential of receiving a life sentence by admitting the State's charges. This exposure to the identical maximum sentence eliminates the incongruity found offensive in *United States* v. *Jackson, supra,* and exacts no penalty whatever upon an accused who elects to defend against the State's charges.

Both state and federal courts have found no constitutional flaw in statutory sentencing scheme where the maximum potential punishment is the same regardless of whether the case is disposed of by jury trial or plea of guilty.[38] Thus in *Commonwealth* v. *Hargrove,* 434 Pa.

[37] N.J.S.A. 2A:113-3.

[38] *State* v. *Weind,* 50 Ohio St. 2d 224, 364 N.E.2d 224 (Sup.Ct. 1977); *State* v. *Bell,* 48 Ohio St. 2d 270, 358 N.E.2d 556 (Sup.Ct. 1976), *cert granted* 97 S.Ct. 2971 (1977); *State ex rel. Rasnake* v.

*(Footnote continued on following page)*

393, 254 A.2d 222 (Sup. Ct. 1970), the Supreme Court of Pennsylvania held that a plea of guilty to a murder charge was not unconstitutionally encouraged, notwithstanding the defendant's claim that he had been induced to plead guilty because of his belief that if he were to stand trial there would be a greater likelihood that he would receive the death sentence. This decision was based on the fact that under the Pennsylvania statute, the defendant faced the same possibility of a death sentence whether he pleaded guilty or not guilty since both the judge and the jury had the authority to impose the death sentence. In discussing the *Jackson* case, the Pennsylvania Court stated:

> It is a clear cut choice between avoiding and risking the death penalty which the Supreme Court found to be such an overbearing one in *Jackson.* Here no such decision was placed before the defendant. At worst the defendant had to make a choice between probabilities, neither of which carried any *guarantee* that the death penalty would not ultimately be imposed. . . . [W]e do not believe that the Pennsylvania procedure suffers from the same constitutional infirmities as that struck down in *Jackson.* (434 Pa. at 396, 254 A.2d at 24; emphasis in original)

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*(Footnote continued from preceding page)*

*Narick,* 227 S.E.2d 203 (Sup.Ct. App. W.Va. 1976); *Commonwealth* v. *Hargrove,* 434 Pa. 393, 254 A.2d 22 (Sup.Ct. 1970); *State* v. *Harper,* 251 S.C. 397, 162 S.E.2d 712 (Sup.Ct. 1968); *Anthamatten* v. *State,* 506 P.2d 959 (Okla. Crim. Ct. App. 1973); *State* v. *Hubbard,* 123 N. J. Super. 345, 303 A.2d 87 (App. Div. 1973); certif. den. 63 N. J. 325, 307 A.2d 98 (1973); *State* v. *Land,* 124 N. J. Super. 303, 306 A.2d 483 (App. Div. 1973); *People* v. *Bradley,* 130 Ill. App.2d 1061, 264 N.E.2d 892 (Ct. App. 1970); *Simms* v. *Eyman,* 405 F.2d 439 (9 Cir. 1969), vacated other grounds, 408 U.S. 845 (1972). *Cf. Ludwig* v. *Massachusetts,* 427 U.S. 618 (1976); *State* v. *Beal,* 470 S.W.2d 509 (Sup.Ct. Mo. 1971).



Similarly, in *Sims* v. *Eyman, supra,* the court held:

> Under Arizona law either the judge or the jury can impose the death penalty so that a defendant must risk death regardless of whether he pleads guilty or chooses a jury trial. The 'burden' petitioner complains of is simply that slightly different evidence may be introduced before a judge, on a guilty plea, than before a jury. This does not constitute the type of burden on the assertion of constitutional rights which *Jackson* would forbid. (405 F.2d a 446)

In *Ludwig* v. *Masschusetts, supra,* the petitioner challenged the constitutionality of Massachusetts' "two-tier" trial system for specified crime, under which the accused is tried in the lower tier, in which no trial by jury is available, and, if convicted, may take a timely appeal to the second tier in which he is entitled to request a trial *de novo* by a jury. In upholding this procedure against due process claims that it unconstitutionally burdened the exercise of the right to a jury trial by subjecting an accused to a potentially harsher sentence if he seeks a trial *de novo* in the second tier, this Court noted that the same range of penaltiies is available at both tiers.[39]

Nevertheless, appellant contends that the mandatory life imprisonment feature of the New Jersey sentencing scheme for first degree murder fails to equalize the relative risks of life imprisonment faced by those accused who elect to stand trial before a jury and those who do not. Appellant's argument, however, overlooks the fact that the possibility of acquittal or conviction of a lesser offense should he proceed to a jury trial, or the imposition of

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[39] 427 U.S. at 628, n. 4.

an identical life imprisonment term should he plead guilty is sufficient to counteract the incentive to plead guilty in order to avoid the mandatory life imprisonment sentence. Although a defendant who elects to stand trial is directly exposed to mandatory life imprisonment, its imposition is dependent upon a contingency-conviction by a jury of first degree murder. If so convicted, life imprisonment is automatic. But, by the same token, a defendant who is acquitted receives no sentence and one who is convicted receives a lesser sentence. So too, the application of the maximum penalty to defendants who plead *non vult* is subject to a contingency—the judicial estimate that life imprisonment is appropriate under the circumstances. Thus the risk of a life sentence that befalls defendants who stand trial and those who do not are relatively equalized. As such, no deterrent effect is exerted on the exercise of constitutional rights.

In any event, the mere fact that an accused pleads *non vult* with the belief that he may receive a mitigated sentence, without more, does not mean that the plea was unconstitutionally encouraged or that he was impermissibly deterred from exercising his Fifth and Sixth Amendment rights.[40] The legislative bargain at issue here maintains the requisite equality of risks and does not condition the receipt of a benefit on a defendant's waiver of his constitutional trial right because there is no assurance, no certainty of avoiding the imposition of life imprisonment upon a plea of *non vult*. In sum, where the identical maximum punishment may follow either a jury trial or a guilty plea, then the statutory scheme is not within the scope of the *Jackson* rationale.

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[40] *State ex rel. Rasnake* v. *Narick*, 227 S.E.2d 203, 206 (Sup. Ct. App. W. Va. 1976); *Commonwealth* v. *Hargrove*, 434 Pa. 393, 254 A.2d 22 (Sup. Ct. 1970).



**B. *United States* v. *Jackson* applies only where the death penalty is a consideration in the decision to defend against a charge or to plead guilty.**

The question, therefore, is whether the mere possibility of receiving a term of less than life imprisonment by pleading *non vult* "unnecessarily" serves to penalize those who elect to contest their guilt. Stated somewhat differently, at issue is whether our statutory scheme places an unwarranted and needless burden upon an accused who wishes to defend against the State's charges by mandating life imprisonment upon a jury finding of guilt. As we have noted, the strength of the inducement to obtain the benefit and avoid the burden can be ascertained only by carefully focusing upon the magnitude of the choices involved.

In this regard, it is argued that the authority of *United States* v. *Jackson, supra,* extends beyond capital cases to the present situation in which a potentially longer sentence is available to those who assert their innocence than to those who plead *non vult*. We have already distinguished *Jackson* with respect to the fact that the maximum penalty can be invoked both after a plea of *non vult* or after a jury trial. *Jackson* is also clearly distinguishable because capital punishment is qualitatively different from mere imprisonment.[41] The risk of incurring the

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[41] *Cf.* Poe, "Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions," 37 *Geo. Wash. L. Rev.* 719, 739-40, 745 (1969); Note, "Discriminatory Sentencing and the Unitary Trial: Two Areas for Application of the United States v. Jackson Rationale," 31 *U. Pitt. L. Rev.* 118, 121 (1969); Comment, 54 *Cornell L. Q.* 448, 452 (1969); Comment, 44 *N.Y. U.L. Rev.* 612, 616 (1969); "The Supreme Court, 1967 Term," 82 *Harv. L. Rev.* 63, 162 (1968); Comment, 22 *Rutgers L. Rev.* 167, 192-93 (1967).

ultimate sanction surely constitutes a higher price for contesting one's guilt than the risk of a longer sentence. Consequently, the corresponding chilling effect on a defendant's desire to stand trial must necessarily be greater. Its finality and severity render the death penalty *sui generis*.[42] Death is a punishment different from all other sanctions in kind rather than degree.

There is no intimation in *Jackson* that its rationale should be extended beyond a statutory scheme which incorporates capital punishment.[43] On the contrary, this Court in *Jackson* specifically concerned itself with the shockingly unfair position of the accused who must gamble his life in order to exercise basic constitutional rights. It continuously spoke of the magnitude of the choice facing a defendant to whom the assertion of a constitutional right might mean death: ". . . the defendant's assertion of the right to jury trial may cost him his life. . . ."[44] "Under the Federal Kidnapping Act . . . the

[42] "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955) (Frankfurter, J.).

[43] As the New Jersey Supreme Court noted in its decision below:

> There is one clear implication in *Jackson* that once the death penalty was eliminated a viable plea negotiation potential in the recast statute was thought desirable. Responding to government suggestion that the federal act could be sustained by judicial elimination of all guilty pleas and waivers, the Court noted that this would require full-dress jury trials in all cases, and, "apart from the cruel impact of such a requirement upon those defendants who would greatly prefer not to contest their guilt," would "rob the criminal process of much of its flexibility." 390 U.S. at 584. *State* v. *Corbitt*, 74 N. J. 379, 396-97 n. 8, 378 A.2d 235 (1977).

[44] 390 U.S. at 572.



defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. One problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert their right to contest their guilt before a jury."[45]

Similarly, the dissenting opinion in *State* v. *Forcella*,[46] assumes that *Jackson* applies only in cases involving the death penalty. In rejecting the contention that a statute mandating life imprisonment upon a conviction following a jury trial but permitting a lesser penalty upon a plea of *non vult* would be violative of the Fifth and Sixth Amendments, the dissent noted that "the inducement [to plead *von vult*] would be insignificant when compared to the death penalty stricken in *Jackson*."[47] The soundness of the dissenters' analysis of the parameters of *Jackson* has been fortified by subsequent decisions of this Court. When *Forcella* came to be reviewed by this Court,

[45] *Id.* at 581.

[46] 52 N. J. 263, 245 A.2d 181 (1968).

[47] 52 N. J. at 300, 245 A.2d at 201. The dissenters also observed that "the law has always been administered with pragmatic cognition of the fact that the difference between the death penalty and imprisonment entails more than matters of logic and degree." 52 N. J. at 300, 245 A.2d at 201. *Jackson* was distinguished upon the basis that it was "concerned solely with the grisly choice between a plea or waiver with an assurance of no death penalty, and a jury trial with the danger of capital punishment." *Id.* at 301. This same conclusion was reached by the New Jersey Supreme Court in *State* v. *Corbitt*, *supra*, 74 N. J. at 399, 378 A.2d at 235.

it summarily struck the death sentences of the several petitioners.[48] Significantly, this Court did not suggest that our statute also required revision to eliminate the disparity between potential penalties on a plea of guilty and after a trial. And when the New Jersey Supreme Court thereafter recast the statute in *State* v. *Funicello,*[49] this Court denied review.[50]

The Court has long appreciated the inhibiting effect that the fear of capital punishment will have on the exercise of a defendant's constitutional rights. In *Fay* v. *Noia,*[51] the petitioner was sentenced to life imprisonment in a capital case and his was the "grisly choice,"[52] of whether to appeal and upon retrial possibly face the death sentence or sit content with life imprisonment. The petitioner did not appeal his conviction through the state courts. This Court held that, in view of the fact that petitioner was motivated by a fear of death, his failure to appeal was not a waiver of the right of habeas corpus but merely a refusal to play "Russian Roulette."[53] Likewise, in *Green* v. *United States,*[54] this Court rejected the contention that a defendant convicted of second degree murder waives his constitutional defense of former jeop-

[48] *Funicello* v. *New Jersey, supra,* 403 U.S. 948.

[49] 60 N. J. 60, 286 A.2d 55 (1972).

[50] *New Jersey* v. *Presha, supra,* 408 U.S. 942.

[51] 372 U.S. 391 (1963).

[52] *Id.* at 440.

[53] *Id.*

[54] 355 U.S. 184 (1957).



ardy to a second trial for first degree murder by making a successful appeal. This Court recognized that the price of a successful appeal was the risk of death and "a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place defendant in such an incredible dilemma."[55]

It is therefore evident that the possibility of death is a far different price to pay for contesting one's guilt than the risk of life imprisonment rather than a term of years.[56] Suffice it to say, there is a constitutional distinction between the "encouragement" to waive constitutional rights which the possibility of the death penalty engenders, and the lesser "encouragement" which arises from holding out fewer years' imprisonment for a plea of guilty.[57] The distinction, after all, is between life and death.

Subsequent judicial holdings have made it apparent that *United States* v. *Jackson, supra,* forbids only government induced choices of a substantial nature akin to that involving the clear cut question between life and death, and that

[55] *Id.* at 193. See also *State* v. *Wolf,* 46 N. J. 301, 216 A.2d 586 (1966).

[56] A "life sentence" is, for all practical purposes, a sentence for less than the natural life of the defendant. *State* v. *Corbitt, supra,* 74 N. J. at 397 n. 9, 378 A.2d at 244 n. 9; N.J.S.A. 30:4-123.11.

[57] Responding to the argument that elimination of the death penalty would impair the State's bargaining position in criminal cases, Mr. Justice Marshall, concurring in *Furman* v. *Georgia,* 408 U.S. 238 (1972), observed that "life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency." *Id.* at 356.

the risks attendant upon the choice a murder defendant must make under the New Jersey statutes as to whether to defend or plead *non vult* are comparable to those arising from any other kinds of decisions a criminal defendant must make in the course of a prosecution.

In *Crampton* v. *Ohio*,[58] this Court upheld the constitutionality of Ohio's system of conducting criminal trials. In Ohio, the jury is permitted to determine guilt and punishment in a single proceeding. Petitioner argued that unless the trial were bifurcated, he would be coerced to forego his right to remain silent in order to argue for mitigation. This he contended "chilled" his Fifth Amendment right because he risked a harsher sentence if he remained silent. This Court held that the Ohio system did not place an impermissible burden on the petitioner's assertion of his Fifth Amendment right. In short, the Court concluded that, "although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."[59] In so holding, it was noted that the decision in *Jackson* was limited to government compelled choices involving life and death.

Similarly, in *Chaffin* v. *Stynchombe*,[60] this Court reiterated the principles set forth in *McGautha* v. *California*, *supra*, and upheld Georgia's unrestricted jury resentencing procedures. Petitioner had been convicted and sentenced to 15 years in prison by a jury on a charge of robbery. He thereafter successfully obtained a writ of

[58] Reported *sub nom. McGautha* v. *California*, 402 U.S. 183 (1971).

[59] 402 U.S. at 213.

[60] 412 U.S. 17 (1973).



habeas corpus. Petitioner was then retried, convicted and sentenced to life imprisonment by a jury which had no knowledge of the previous sentence. Petitioner argued that the possibility of receiving a harsher sentence had a chilling effect on the exercise of his right to appeal or collaterally attack his conviction. The Court was unpersuaded and rejected petitioner's claim that its holding in *United States* v. *Jackson*, *supra*, called for abrogation of the Georgia system. It reasoned that the Georgia practice was a legitimate one and that an incidental consequence of the procedure was that it required the accused to choose to accept the risk of a greater sentence or waive his rights.[61] Despite the fact that under Georgia's system an accused might be penalized by exercising his right to appeal, the Court held that the possibility of receiving a harsher sentence did not needlessly exact an unconstitutional burden.[62]

Courts in other jurisdictions besides New Jersey have also construed the holding in *United States* v. *Jackson*, *supra*, as applying only to the "*grisly*" choice between life and death. In *Whaley* v. *State*,[63] for example, the Kansas Supreme Court rejected a claim that an accused was discouraged from asserting his Fifth and Sixth Amendment rights because of the possibility that the prosecutor would invoke the habitual offender statute if he proceeded to trial. The Court noted that the possibility of an enhanced sentence by electing to contest the State's charges does not alone constitute a burden of the magnitude involved in *Jackson*.[64]

[61] *Id.* at 32-33.

[62] *Id.* at 35.

[63] 202 Kan. 175, 446 P.2d 397 (Sup. Ct. 1968).

[64] *Id.* at 176, 446 P.2d at 398.

Likewise, the Illinois Court of Appeals has held that the financial burden placed upon an accused who elects to contest his guilt by proceeding to trial does not consitute a "substantial" penalty for the assertion of a constitutional right. In *People* v. *Peters*,[65] defendant contended that an Illinois statute which required an accused to reimburse the State's attorney with respect to per diem expenses upon conviction following a trial deprived him of his Fifth Amendment right to contest his guilt. More specifically, it was argued that an assessment of trial costs made pursuant to the statute constituted a penalty imposed by virtue of the defendant's election to defend against the State's charges. The Court of Appeals summarily rejected defendant's claim that *United States* v. *Jackson, supra,* was applicable. The Court held that the financial burden imposed by the statute was infinitely less substantial than the possibility of receiving the death penalty. Hence, the statute did not serve to penalize those who elected to contest their guilt.[66]

In *State* v. *Gumienny*,[67] the Court held that Hawaii's procedure under which acceptance of a plea of guilty may be deferred and a defendant eventually discharged without an adjudication of guilt did not impose an impermissible burden on the exercise of the right to trial by jury. The Court equated the inducement to forego this right inherent in Hawaii's Deferred Acceptance of Guilty Plea (DAGP) procedure with the opportunity to plead guilty

[65] 32 Ill.App.3d 1018, 337 N.E.2d 73 (Ill.App.Ct. 1975).

[66] See also *Fuller* v. *Oregon*, 417 U.S. 40 (1974) (Oregon recoupment statute for attorney's fees does not impermissibly chill assertion of the right to counsel).

[67] 568 P.2d 1194 (Sup.Ct. Haw. 1977).



to a lesser offense pursuant to a plea bargain. It thus reasoned that since the principle of *United States* v. *Jackson, supra,* clearly does not extend to the inducement to forego a jury trial which accompanies a proposal that a defendant plead guilty to a lesser offense, it should have no application to the DAGP procedure.

At issue in *Yeomans* v. *State*,[68] was a Georgia statute allowing those defendants not introducing evidence to open and conclude the argument to the jury, while depriving those defendants who introduced testimony of the same right. The Court concluded that the statute was not constitutional as chilling the assertion of the constitutional right to have compulsory process for obtaining witnesses by penalizing those who choose to exercise such right. In the course of its opinion, the Court noted that the *Jackson* case was no authority for holding the state statute unconstitutional since "there can be no real comparison beween choosing between a trial by jury and a possible death penalty, and choosing between the right to have witnesses on a trial and the procedural advantage of having opening and concluding argument.[69]

It is thus apparent that the mere possibility of receiving a lesser term of imprisonment by not proceeding to trial does not serve to penalize those who choose to defend against the State's charges. Rather, as noted, it was the threat of the death penalty in *Jackson* which rendered the federal statute constitutionally infirm.

[68] 229 Ga. 433, 192 S.E.2d 362 (Sup. Ct. 1972).

[69] *Id.* at 365. *Cf. Stock* v. *State*, 526 P.2d 3, 17 (Alaska Sup. Ct. 1974).

**C. The New Jersey statutory scheme does not penalize those who elect to contest their guilt.**

New Jersey's statutory scheme does not present a chilling effect on those who choose to plead *non vult* rather than go to trial. To argue otherwise, as appellant suggests, would be to find unconstitutional any statute or practice by which an individual is faced with the choice between receiving a state-bestowed benefit or exercising a constitutional right. We note in this context that if the Fifth and Sixth Amendments bar a lesser penalty when guilt is admitted, the entire practice of plea bargaining is necessarily implicated for certainly the possibility of a plea bargain in any context "encourages" the tendering of guilty pleas in some sense.[70] The broadest interpretation of *Jackson* could conceivably lead to a conclusion that whenever a system provides a means to obtain leniency, either by statute or practice, a defendant who rejects a proposed plea bargain, contests guilt, and receives a heavier penalty, is deprived of his Fifth and Sixth Amendment rights.

The Court in *Jackson,* however, recognized this implication as undesirable and therefore took a narrower view. The decision emphasized that allowing uncoerced guilty pleas was a legitimate congressional objective as part of the task of maintaining flexibility in the criminal

[70] See, "The Supreme Court, 1967 Term," 82 *Harv.L.Rev.* 63, 161-62 (1968). Plea bargaining operates to place a premium upon pleading guilty and the waiver of a jury trial by inducing a defendant to do so in exchange for an advantage concerning the sentence that will be awarded. Empirical studies have amply demonstrated that, as a class, those who plead not guilty before a jury receive higher sentences than those who confess their guilt. See, *e.g.*, Note, "The Influence of the Defendant's Plea on Judicial Determination of Sentence," 66 *Yale L.J.* 204 (1956).



process.[71] This Court approved the practice of plea bargaining—a practice which, in effect, encourages a defendant to waive many of his constitutional rights for the benefit of a lesser sentence.

Decisions subsequent to *Jackson* demonstrate that this Court has not adopted the broad interpretation that appellant now urges.[72] In these cases, defendants, who had pleaded guilty to avoid the possible imposition of the death penalty, attempted to retract their pleas by asserting that the statutes under which they were prosecuted dissuaded them from exercising their constitutional rights. The principal thrust of their argument was grounded upon the claim that they had abandoned their right to defend in order to safeguard their right to live. They thus asserted that their guilty pleas were "coerced." This Court perceived no constitutional violation. More specifically, it was reasoned that the defendants' dilemma was no different from the circumstances existing in any common plea bargaining situation.[73] Although it was recognized that plea bargaining has a potentially chilling effect on assertion of Fifth and Sixth Amendment rights, the practice was upheld as a necessary and legitimate adjunct to the administration of criminal justice.[74]

[71] 390 U.S. at 584-85.

[72] See, *e.g., North Carolina* v. *Alford,* 400 U.S. 25 (1970); *Parker* v. *North Carolina,* 397 U.S. 790 (1970); *Brady* v. *United States,* 397 U.S. 742 (1970).

[73] *Brady* v. *United States, supra,* 397 U.S. at 751.

[74] *Id.* at 751-53. As the Court said in *Brady*:

> [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary. [397 U.S. at 751-53]

This Court subsequently reiterated its position with regard to plea bargaining. In fact, in *Santobello* v. *New York*,[75] it was suggested that plea bargaining is a virtuous and desirable practice which should be encouraged.[76] This, despite the fact that plea bargaining presents a potentially chilling effect upon the assertion of the constitutional right to defend.

More recently, this Court held that the due process clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the lesser offense with which he was originally charged.[77] In the course of its decision, this Court noted:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Chaffin* v. *Stynchcombe, supra,* 412 U.S. at 31. It follows that by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty. (98 S.Ct. at 668)

[75] 404 U.S. 257 (1971).

[76] *Id.* at 260-61.

[77] *Bordenkircher* v. *Hayes,* —— U.S. ——, 98 S.Ct. 663 (1978).



The New Jersey *non vult* statute possesses many attributes of plea bargaining. It may potentially be utilized to achieve the same result as the downgrading of offenses or the dismissal of selected charges. In short, our situation is so closely analogous to plea bargaining as to be indistinguishable.[78] If it is permissible, by engaging in plea bargaining, to induce a defendant to plead guilty and waive his right to trial, as this Court has repeatedly so held, *a fortiori* no substantial constitutional question is presented when a legislature offers the possibility of a lesser sentence upon rendition of a plea of *non vult.*

**D. No needless nor unnecessary burden is placed upon a defendant who chooses to contest his guilt.**

It is the position of the State of New Jersey that *United States* v. *Jackson, supra,* is inapposite for yet another reason. As we have noted, the Supreme Court

[78] As the New Jersey Supreme Court noted below: ". . . encouragement of guilty pleas is at the very heart of an effective plea negotiation program." *State* v. *Corbitt, supra,* 74 N. J. at 396, 378 A.2d at 243-44. Indeed, statutory plea bargaining is arguably the most equitable method of encouraging guilty pleas. See Comment, 44 *N.Y.U.L.Rev.* 612, 619 (1969). In the case of most bargained pleas, the defendant is at the mercy of the prosecutor who has discretion to accept or reject a tendered guilty plea to a lesser crime. *Id.* By reducing prosecutorial discretion, statutory plea bargaining seems to comply with the American Bar Association's recommendation that "[s]imilarly situated defendants should be afforded equal plea agreement opportunities." A.B.A., Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty §3.1(c) (1967). Moreover, statutory plea bargaining eliminates any possibility of vindictive or retaliatory measures taken against an accused for lawfully contesting his guilt. *Cf. Blackledge* v. *Perry,* 417 U.S. 21, 26-28 (1974).

concluded that the death penalty provision in the Federal Kidnapping Act "needlessly encouraged[d]" those charged with having committed the offense to waive their rights both to contest guilt and to do so before a jury.[79] This Court in *Jackson* emphasized that the inducement inherent in the federal statute was "needless" and "unnecessary" and "therefore excessive."[80] The use of these terms by this Court plainly indicates that not every burden imposed upon a defendant who elects to contest the State's charges is subject to constitutional attack.[81] Rather, implicit in *Jackson* is the proposition that if the particular procedure that imposes the penalty serves legitimate functions, then the utility of those functions must be weighed against the procedure's inhibiting effects. It may be that "other values come into play and . . . demonstrate that the incidental impact . . . is not 'needless'. . . ."[82] The issue for present purposes then is whether there is a "needless" encouragement of guilty pleas due to a statutory disparity between either maximum or minimum punishment on conviction and on a guilty plea when the death penalty is not involved. Resolution of this issue requires a determination as to whether the statutory option is reasonably related to a proper governmental goal unattainable by less restrictive alternatives.

At the outset we note that our *non vult* statute, which embodies the principles of plea bargaining, was enacted in pursuance of a valid legislative policy which benefits

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[79] 390 U.S. at 583.

[80] *Id.* at 582.

[81] See *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30 (1973).

[82] *State* v. *Forcella, supra*, 52 N. J. at 274, 245 A.2d at 186.



and best serves the interests of both the State and defendants who are willing to admit their guilt.[83] It benefits the particular defendant involved by allowing him to avoid the expense and hardship of a trial while assuring the prompt commencement of the correctional process.[84] More significantly, statutory plea bargaining affords the defendant the possibility of reducing his sentencing exposure.[85] In this regard, it should be emphasized that plea bargaining is predicated upon the just and humane concept that those who acknowledge guilt are probably better prospects for rehabilitation and should be given consideration on that account. Surely, "we should not deny a justified leniency for the many, merely to be positive that no man is needlessly encouraged not to defend."[86] The gain to the many plainly outweighs whatever evil may repose in encouraging the guilty to confess. As to the fear that the innocent might be stampeded, "there are safeguards against a false guilty plea."[87] A plea of

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[83] *State* v. *Corbitt, supra*, 74 N. J. at 396, 378 A.2d at 244; *State* v. *Forcella, supra*, 52 N. J. at 275, 245 A.2d at 187. Indeed, N.J. S.A. 2A:113-3 which added the *non vult* plea was intended "to benefit murder defendants" and "to ameliorate the course of capital punishment." *State* v. *Forcella, supra*, 52 N. J. at 277, 278, 245 A.2d at 188, 189. The *Forcella* dissenters point out that the Legislature "ever since 1893 . . . has declared that a murder defendant shall have the right to tender a *non vult* plea which, if accepted, will preclude the possibility of the death penalty." *Id.* at 299, 245 A.2d at 200.

[84] *Brady* v. *United States, supra*, 397 U.S. at 752.

[85] *Id.*

[86] *State* v. *Forcella, supra*, 52 N. J. at 276, 245 A.2d at 188.

[87] *Id.*

guilty may not be entered if the accused claims he is innocent.[88] Further, in New Jersey a "factual basis" must support the defendant's decision not to contest the State's charges.[89] With respect to those who perceive a benefit in the form of a lesser sentence if they plead guilty, it can hardly be argued that they are "needlessly" penalized by virtue of the election to reject such a course. The potential of receiving a lesser penalty upon a plea of guilty is not "unnecessary." Nor is the burden that is incidentally imposed upon such an individual "excessive."

From the State's viewpoint, our statutory sentencing scheme for murder serves the interest in the efficient administration of criminal justice by conserving scarce judicial and prosecutorial resources for those cases in which there is a substantial issue of the defendant's guilt.[90] The flexibility of the criminal process is preserved thereby increasing the court's ability to individualize justice. Finally, encouraging guilty pleas allows for imposition of punishment which may more effectively attain penal objectives.[91]

It is this mutuality of advantage inherent in plea bargaining in general, whether statutory or prosecutorial, that perhaps explains, according to *Brady*, "the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the

[88] *State* v. *Reali*, 26 N. J. 222, 139 A.2d 300 (1958).

[89] *Id.*

[90] *Cf. Brady* v. *United States*, *supra*, 397 U.S. at 752.

[91] *Id.*



hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury."[92] Thus, the substantial benefits to the State as well as to the generality of criminal defendants, noted above, constitute a "need" for the encouragement of guilty pleas within the requirement for such need laid down by *Jackson*.[93]

Furthermore, our *non vult* statute serves vital policy interests that are unattainable in other ways.[94] The available alernatives to our statutory sentencing scheme for murder, namely, abolishing all *non vult* pleas and jury waivers, in murder cases, providing mandatory life imprisonment for all first degree murderers regardless of how their guilt was determined, or eliminating the mandatory life imprisonment feature of N.J.S.A. 2A:113-4 and allowing complete sentencing discretion in all murder cases, are neither reasonable nor very attractive. The first is clearly unacceptable in light of this Court's rejection of a similar suggestion in *Jackson*.[95] The second seems

[92] *Id.* at 751-52.

[93] *State* v. *Corbitt*, *supra*, 74 N. J. at 396, 378 A.2d at 244.

[94] The theory employed in *Jackson* requires that the exercise of constitutional rights cannot be penalized unless there are no less burdensome means to secure a more important policy goal. This Court noted, *obiter*, that the policy of allowing a jury to impose the death sentence could be achieved by alternative methods that would not chill the assertion of those rights, such as by allowing a jury to determine the sentence regardless of the method of determining guilt. Hence, the exclusive power of the jury to impose the death penalty could not be upheld as incidental to a valid legislative objective, for the Kidnapping Act "needlessly" penalized defendants who stood on their right to plead not guilty before a jury.

[95] 390 U.S. at 584.

unduly harsh. The third alternative would seriously undermine, if not nullify, the legislative determination that life imprisonment is the appropriate penalty in first degree murder cases. As such, the suggested alternative scheme would be destructive of paramount governmental goals that favor the life imprisonment mandate, namely, deterrence of and just retribution for the most serious and heinous offense recognized by our Legislature. Thus, if proper deference is given to legislative authority, any encouragement to plead *non vult* inherent in our murder statutes' penalty differential cannot be deemed "unnecessary" or "needless" for the Legislature has the broadest discretion possible in enacting penal statutes and in specifying punishment for crime.[96]

Moreover, the practical effect of both the second and third alternatives may be a substantial reduction in the incidence of use of the guilty plea since a defendant would have much to gain and nothing to lose by contesting rather than admitting his guilt. Concomitant with a reduction of guilty pleas is the erosion of many of the policy considerations previously discussed, upon which the plea is based. Since either the second or third alternative would interefere with concededly legitimate state interests, the arguable burden imposed by New Jersey's statutory sentencing scheme for murder on the right to trial by jury is no less necessary than the burdens tolerated in

[96] It may be that if imposition of a fixed term upon conviction by a jury of first degree murder is barred because of the possibility of a lesser term upon a plea of *non vult*, our Legislature, desirous of satisfying the policy considerations underlying the life imprisonment penalty, may conceivably abolish the *non vult* plea to murder altogether and mandate such punishment in all first degree murder cases. It would thus be paradoxical that appellant's challenge to the present statutory sentencing scheme for murder may result in the establishment of one with harsher consequences.



*Brady* v. *United States, supra, McGautha* v. *California, supra* and *Chaffin* v. *Stynchcombe, supra.*

In sum, we submit that the value of the state interests involved herein clearly outweighs any arguable inhibiting effect of our statutory sentencing scheme for murder upon constitutional rights. In striking this balance, we observe that the degree of inducement, if any, under New Jersey's murder statute is far less severe than that of the Federal Kidnapping Act at issue in *Jackson.* A defendant who proceeds to trial in New Jersey on a murder charge no longer faces a "grisly" choice. His knowledge that those who plead *non vult* face the same possibility of a life term certainly diminishes any alleged agony inherent in his choosing a trial over a plea. Finally, his knowledge that others who plead may receive a sentence less than life imprisonment is no different from the situation confronting all defendants who proceed to trial, aware of the fact that others have obtained bargains to plead guilty in exchange for dismissal of other pending charges or for some other benefit. In short, there are no excessive or unnecessary conditions encompassed in the present New Jersey murder statutes such as to render them unconstitutional. Where the burden of choice is as speculative as this one is, incursions upon valid state interests are not justified.

## POINT II

### The sentencing scheme of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 does not constitute a violation of a defendant's right to equal protection.

Defendant has argued that the sentencing scheme of the New Jersey murder statutes violates the Equal Protection Clause of the Fourteenth Amendment. He has

pointed to the fact that those who have pleaded *non vult* to murder may be sentenced to a terms of years, while others who have been convicted of first degree murder following a trial are necessarily sentenced to life imprisonment.[97] The import of the argument is that the State may not impose, without compelling justification, "different punishments for the same" crime where the differing penalties are based entirely on whether the accused has chosen to stand trial.

We contend that the theory advanced is specious and cannot withstand close examination. The question presented is one of due process rather than equal protection since the issue cannot be rationally dealt with in terms of "classifications." The right to a jury trial is not discriminatory. It is available to every defendant. Those who avail themselves of the right to a jury trial are equally subject to a mandatory life imprisonment term upon conviction for first degree murder. So too, those who pled *non vult* to murder are similarly exposed to the maximum punishment although a lesser sentence is possible. To the extent that the penal consequences for all defendants depend upon a combination of variables peculiar to each individual case, it cannot be said that our Legislature has established "invidious classifications" for the purpose of exacting a price upon that category of offenders who exercise a constitutional right.

Other considerations support our position. First, our statutes do not provide disparate punishments "for the same offense." A short form indictment is sufficient to encompass both first and second degree murder.[98] Hence,

[97] N.J.S.A. 2A:113-3, 4.

[98] *State* v. *Zelichowski*, 52 N. J. 377, 382, 245 A.2d 351, 354 (1968).



a defendant is not permitted to plead *non vult* to any particular degree of murder.[99] In the words of the statute, the plea is to be directed "to the indictment" which charges murder generally. In contrast, the mandatory term of life imprisonment is applicable only following a jury finding of first degree murder. It is apparent, therefore, that those who plead *non vult* to "murder" and those who are found guilty of first degree murder are not similarly situated. The sentencing scheme merely reflects this basic reality. Second, an equal protection argument is predicated upon the erroneous assumption that all similar conduct constitutes the "same offense." Although we will shortly set forth our argument in some detail, it is enough to observe here that criminal statutes often overlap in prohibiting the same conduct and a prosecutor's decision to proceed under one or another has never been thought to offend the concept of equal protection. The same principles are applicable with respect to our murder statutes. Although the offense of "murder" and "murder in the first degree" may be said to "overlap," equal protection is not offended as long as the court does not act arbitrarily in exercising its discretionary power to accept or reject a plea of *non vult*.

Even assuming that our murder statutes provide disparate punishments "for the same offense," it is the position of the State of New Jersey that it would be grossly unfair if all had to be sentenced without regard to their acknowledgment of guilt. While it is true that the law may not add a penalty by virtue of a defendant's election to contest the State's charges,[100] it is not irrational to take

[99] *State* v. *Sullivan*, 43 N. J. 209, 245-46, 203 A.2d 177, 197 (1964), *cert. den.* 382 U.S. 990 (1966).

[100] *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969); *Thomas* v. *United States*, 368 F.2d 941 (5 Cir. 1966).

into account defendant's prospect for redemption reflected by his attitude toward the truth.[101] As the New Jersey Supreme Court aptly observed in *State* v. *Poteet, supra,* "[t]he aims of punishment are several, but the hope is constant that . . . mild or severe, [it] will shape the offender."[102] Assaying the prospects for rehabilitation, the court must look at the man as well as the offense," and it is here that a defendant's candid acknowledgment of guilt should be given some consideration.[103] Although it would be conceptually wrong to enlarge the crime for which a defendant is being punished because he chose to stand trial, it is equally clear that a legislative judgment based upon the premise that a frank confession indicates some promise of rehabilitation is neither unsound nor unjust. In any event the State of New Jersey has exhaustively set forth its argument with regard to this question in Point I. Suffice it to say, we do not perceive it to be a violation of equal protection to accord a benefit to those who have acknowledged their guilt by pleading *non vult.*

**A. There is no cognizable class against which equal protection is being denied**

The guarantee of equal protection requires that a legislative classification bear a rational relationship to a legitimate governmental goal.[104] When a legislature cre-

[101] *State* v. *Poteet,* 61 N. J. 493, 496, 295 A.2d 857, 859 (1972).

[102] *Id.* at 496, 295 A.2d at 859.

[103] *Id.*

[104] See Tussman and Ten Broek, "The Equal Protection of the Laws," 37 *Calif. L. Rev.* 341, 348 (1949); Note, "Development in the Law: Equal Protection," 82 *Harv. L. Rev.* 1065, 1077-81 (1969).



ates a classification, those similarly situated must be treated alike.[105] It is manifest that the threshold question in resolving any alleged equal protection violation is whether the challenged legislation or state practice creates any classification whatsoever. The point is best illustrated by Justice Harlan's dissenting opinion in *Griffin* v. *Illinois.*[106] There, it will be recalled, the majority held the Illinois practice which required an appellant to absorb the costs of providing a transcript on appeal constituted a violation of equal protection because it unreasonably discriminated on the basis of wealth. Justice Harlan dissented, contending that the basis for the majority holding was not equal protection but rather due process.[107] He explained that when the State imposes legal disabilities upon a named class the equal protection guarantee is called into question.[108] Merely posing a choice or condition to receipt of a State-proffered benefit, on the other hand, involves no classification.[109] Accordingly, such a system is properly analyzed by employing the "fundamental fairness" standard of the due process clause.[110]

In the instant case, the initial inquiry is whether the Legislature has in fact made any classification which ar-

[105] *Id.* at 344-46.

[106] 351 U.S. 12 (1956).

[107] *Id.* at 36.

[108] *Id.* at 35-36.

[109] *Id.*

[110] *Id.* at 36.

bitrarily treats those similarly situated. Otherwise stated, the question presented is whether the New Jersey Legislature has singled out a particular group of individuals and arbitrarily imposed upon that class a legal disability that it does not impose upon all others in a like position. So posited, the State of New Jersey submits that the only class created by the Legislature is the unitary category of indicted murderers. Our statutes offer a series of effectively identical choices to all members of this class. Specifically, all defendants have the opportunity to plead *non vult*. Acceptance of the plea, of course, is in the discretion of the court. Of significance, however, is that all defendants possess an equal opportunity to request the court's indulgence. Thus, the system does not designate two separate classes to which it imposes distinct legal disabilities. Rather, our system merely provides several courses of action to all defendants charged with murder. As such, it differs fundamentally from state laws, held to be violative of equal protection, which divide individuals into two classes on the basis of durational residency (old and new residents) and discriminate against the latter to the extent of totally denying them the opportunity to vote,[111] to receive welfare assistance, [112] or to receive medical care.[113] Thus it is evident that this case does not implicate values underlying the equal protection clause. Rather the question presented is one of due process. Specifically, the issue is whether the election compelled by our statutory scheme is fundamentally unfair. The

[111] *Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

[112] *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

[113] *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974).



fairness of the choice, phrased in terms of whether it is constitutionally onerous, has been amply demonstrated.[114]

As previously noted, New Jersey's statutory scheme for murder furnishes an equal choice for all defendants. Any arguable classification inherent in our system results from the defendant's voluntary selection of the statutory option. Even assuming a classification, however, the question becomes whether the State has invidiously discriminated against a particular category of individuals. In determining this issue, it is essential to ascertain what class of defendants are being compared with what other class of defendants, for what purpose and at what point in time.

In this regard, the argument that the defendant who receives a mandatory life imprisonment term after trial and conviction has been discriminated against because he receives a heavier sentence, possibly, than his counterpart who pleads *non vult* errs on two counts. First, the comparison is made at the wrong time—after trial, when the uncertainty of litigation has passed, rather than before trial. Second, the comparison is made between the wrong categories of defendants—the class of defendants convicted after trial versus the class of defendants who plead *non vult* rather than the class of defendants who exercise their right to trial versus the class of defendants who do not.[115] Since the alleged danger in our legislative option is that defendants deciding on a plea will be deterred from exercising their right to a trial, the relevant vantage point is thus before trial, and the relevant comparison is between the expectations of those who insist upon a

[114] See Point I, *supra.*

[115] *Cf. Scott* v. *United States,* 419 F.2d 264, 277 (D.C. Cir. 1969).

trial and those who decide to eliminate the risk of trial by pleading *non vult*.[116] A comparison of those expectations proves illuminating. A defendant indicted for murder who stands trial may be acquitted and hence receive no sentence or may be convicted of a lesser offense and receive a sentence shorter than life imprisonment. One who pleads *non vult* to murder, on the other hand, has no right to demand acceptance of his plea. In any event, acceptance of the plea confers no right to any particular sentence short of life imprisonment. Since the result in either case depends upon a combination of variables peculiar to each situation, it cannot be said that New Jersey has invidiously classified those who stand trial by imposing a mandatory penalty upon conviction any more than that the State has invidiously classified those who plead *non vult* by denying the members of that group the opportunity to be acquitted.[117]

This Court in *North Carolina* v. *Pearce, supra,* rejected a similar equal protection challenge to North Carolina's scheme allowing imposition of a more severe sentence upon reconviction of a defendant who has had his original conviction set aside at his own behest. Noting that a man who is retried after his first conviction has been set aside may be acquitted, or if convicted, may receive a shorter sentence, the same sentence or a longer sentence than the one originally imposed,[118] the Court stated that "[t]o fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished."[119]

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[116] *Id.* at 276-77.

[117] *Cf. North Carolina* v. *Pearce,* 395 U.S. 711 (1969).

[118] 395 U.S. at 722.

[119] *Id.* at 723.



Accordingly, we submit that appellant's contention regarding the alleged denial of the equal protection guarantee is without merit.

**B. Assuming a cognizable class, there is no disparity of punishment for the same offense**

A *non vult* plea to murder in New Jersey does not involve the same crime as a conviction for first degree murder, although in some circumstances both may encompass similar conduct. First degree murder is a crime in which conduct of a specific nature and quality is proscribed. The sentence for such conduct is life imprisonment. A *non vult* plea is not comparable to a conviction of a specific degree of murder.[120] Rather, it is a plea to the indictment encompassing conduct which may constitute both degrees of murder, and manslaughter as well.[121] The plea must be accepted without specification of the degree of guilt.[122] Accordingly, the sentence for the plea spans the broad range of conduct encompassed by the indictment. It is apparent that a plea of *non vult* is for an offense different from first degree murder because it includes a far broader range of criminal conduct.

It was upon this basis that a similar claim was rejected by the New Jersey Supreme Court in *State* v. *Sullivan, supra.* There, the defendant had been convicted of first degree murder. On appeal, he contended that our mur-

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[120] *State* v. *Sullivan,* 43 N. J. 209, 245-46, 203 A.2d 177, 197 (1964), *cert. den.* 382 U.S. 990 (1966); *State* v. *Williams,* 39 N. J. 471, 479, 189 A.2d 193, 197 (1963), *cert. den.* 374 U.S. 855 (1963).

[121] *State* v. *Sullivan, supra,* 43 N. J. at 246, 203 A.2d at 197.

[122] *Id.*

der statutes exacted a penalty with regard to those who elected to contest their guilt. It was argued that disparate penalties were imposed depending upon the accused's election to plead *non vult* or contest the State's charges. Defendant claimed that such an election deprived those charged with murder "of due process and equal protection of the law."[123] The court was unpersuaded.

> Not only is there no right to demand acceptance of a plea of *non vult,* but acceptance thereof by the court confers no right to any particular sentence short of life imprisonment. As N.J.S.A. 2A:113-3 prescribes, the term may be for life or for any period up to the 30-year maximum for second degree murder. One reason for the broad expanse of sentencing power is the nature of the indictment. As we have said, it specifies no degree of murder, and will support a conviction of first or second degree murder or manslaughter. (We note in passing it has been suggested persuasively that there is nothing in our rules or statutes which prohibits a specific indictment for second degree murder in a proper case.) Under our cases the plea must be to the indictment. It should not be to a specific degree of murder. Nor does the statute, as in earlier days, contemplate a hearing to determine the degree of guilt or the nature of the sentence to be imposed. *State* v. *Williams,* 39 N.J. 471, 479 (1963). Sentence is passed by the court within the broad limits authorized after consideration of the nature of the offense and a comprehensive probation report. R.R. 3:7-10(b). (*Id.* at 246-47, 203 A.2d at 197).

[123] *Id.* at 245, 203 A.2d at 197.



Appellant contends that since an accused who theoretically commits the same crime as one convicted of first degree murder may plead *non vult,* our statutes impose different punishments for the same offense. This argument is based on the faulty assumption that all similar conduct constitutes the same crime. It is evident, however, that an accused's conduct may violate two overlapping statutes. Where there is such an overlap, the prosecuting authority has discretion to proceed under either statute.[124] So long as the prosecutor does not act arbitrarily and does not discriminate against a class of defendants, it has been held that equal protection is not denied.[125] In short, the mere existence of overlapping statutes is not a deprivation of equal protection.

Just as two or more statutes may cover the same conduct so that different penalties may be imposed for the identical offense, the New Jersey murder statutes may be said to "overlap." The major difference is that under our murder laws, the discretion to administer the statutes does not reside solely in the prosecutor. Instead, the accused may tender a plea of *non vult,* but the court must decide whether to accept it. If a conviction for first degree murder best serves the legislative purpose, the plea must be rejected or a comparable sentence be imposed.[126]

[124] *United States* v. *Berrigan,* 482 F.2d 171 (3 Cir. 1973); *Newman* v. *United States,* 127 U.S. App. D.C. 263, 382 F.2d 479, 480 (1967).

[125] *United States* v. *Rugiero,* 472 F.2d 599, 606 (2 Cir. 1973), *cert. den.* 412 U.S. 939 (1973); *United States* v. *Eisenman,* 396 F.2d 565, 568 (2 Cir. 1968); *United States* v. *Andrews,* 370 F.Supp. 365, 370 (D. Conn. 1974).

[126] *State* v. *Sullivan,* 43 N. J. 209, 203 A.2d 177 (1964), *cert. den.* 382 U.S. 990 (1966); *State* v. *Forcella,* 52 N. J. 263, 245 A.2d 181 (1968), *cert. den. sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972).

To further clarify the point, the situation can be viewed in a slightly different fashion. In many instances in which an individual commits a criminal act, his conduct may constitute both a greater and lesser offense. For example, activity which constitutes atrocious assault and battery in New Jersey is also proscribed by our disorderly persons statute.[127] Activity which constitutes robbery also falls within our larceny statute.[128] The prosecutor has discretion to choose the charge. Furthermore, he can charge the greater offense and then later downgrade it in exchange for a plea of guilty. The individual who is tried and convicted of the greater offense is not denied equal protection because another who may have engaged in similar conduct is either charged or convicted of the lesser crime.

Analogously, one who is convicted of first degree murder cannot complain that he was denied equal protection because another was permitted to plead *non vult*. Viewed within this context, it is apparent that equal protection is denied only if the various relevant statutes are applied in an arbitrary or discriminatory fashion. If no particular class is singled out for harsher treatment, the equal protection clause is not violated.

### C. The penalty provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 bear a rational relationship to a legitimate, indeed compelling, state objective

Any analysis of the manner in which statutes are applied must be considered in light of the proposition that

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[127] Compare N.J.S.A. 2A:90-1 with N.J.S.A. 2A:170-26.

[128] Compare N.J.S.A. 2A:141-1 with N.J.S.A. 2A:119-1.



"Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them."[129] As long as some reasonable basis exists for the recognition of separate classes and disparate treatment, and the legislation has a rational relation to the object sought to be achieved, there is no constitutional infirmity.[130] The function of the judiciary in reviewing a statute "is to determine whether it is possible to say that the legislative decision is without rational basis."[131]

It is the position of the State of New Jersey that the rational relationship test for determining equal protection should be utilized in analyzing the sentencing provision of the murder statutes.[132]. In the area of classification of criminal offenders for purposes of punishment, legislatures are allowed considerable leeway and may provide for differences of treatment so long as there is some rational nexus between the classification and a valid legislative purpose.[133]

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[129] *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969).

[130] *See Eisenstadt* v. *Baird,* 405 U.S. 438, 446-447 (1972); *United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U.S. 4 (1970).

[131] *Clark* v. *Paul Gray,* 306 U.S. 583, 585 (1939).

[132] This is most consistent with Mr. Justice Stewart's majority opinion in *United States* v. *Jackson, supra,* 390 U.S. 570. He recognized there that the Federal Kidnapping Act's penalty clause was rationally related to the legitimate policy of mitigating the death penalty, but demanded a showing of a necessary relationship between the policy and the waiver procedure. 390 U.S. at 581-83. There is not a single sentence in the opinion which suggests that the procedure must be necessarily related to a compelling state interest.

[133] *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *State* v. *Corbitt,* 74 N. J. 379, 401, 378 A.2d 235, 247 (1977); *State* v. *Fearick,* 69 N. J. 32, 350 A.2d 227, 230 (1975); *State* v. *Smith,* 58 N. J. 202, 206-207, 276 A.2d 369, 371 (1971).

To be sure, this Court, recognizing this traditional test, has in recent years recognized that there are some situation where it is inappropriate to apply the "rational relationship" test. Certain statutory classifications are so inherently suspect as to compel greater judiciary scrutiny (*i.e.*, those based on race, nationality, alienage, political affiliation and sex). So too, statutory schemes which affect fundamental rights (*i.e.*, voting, travel, rights with respect to criminal procedure) are to be carefully reviewed.[134] In these cases, a stricter equal protection standard has been fashioned by this Court requiring a showing that the statutory scheme challenged is based upon a "compelling governmental interest." Phrased somewhat differently, if a statutory classification is based upon an inherently suspect criterion, or if it affects fundamental rights, then it must be demonstrated that the legislation is necessary to promote a compelling governmental interest.[135] A heavy burden of justification is imposed upon the State and such statutes are closely scrutinized in light of their essential purposes.[136]

It is submitted that the New Jersey statutory scheme for murder does not create a classification which is "inherently suspect." Neither does it affect fundamental rights. Contrary to appellant's assertion, the right to a jury trial is not implicated herein. The imposition of a life sentence is not made to depend upon the exercise of

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[134] See "Developments in the Law—Equal Protection," 82 *Harv. L.Rev.* 1064, 1124-1128 (1969).

[135] See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (Harlan, J. dissenting).

[136] *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *State* v. *Chambers*, 63 N. J. 287, 307 A.2d 78 (1973).



the jury trial guarantee but rather upon conviction of first degree murder. Stated somewhat differently, our statutory scheme for murder does not penalize a defendant for standing trial but in reality penalizes him for commission of the offense of first degree murder. Given the legislative determination that life imprisonment is the appropriate punishment in such cases, the fact that the possibility of lesser penalties are provided for statutorily does not place an unconstitutional burden on the defendant's rights to plead not guilty and to demand a jury trial. Accordingly, the proper test to be employed here is the "rational relationship" formula.

Whatever burden of justification the classification created must meet, the State submits that New Jersey's statutory sentencing scheme for murder is constitutional. Our murder statutes have a legitimate purpose and serve a compelling state interest. The State's interest is not in dealing more harshly with the defendant convicted by a jury of first degree murder but rather in ameliorating the rigor of life imprisonment for those offenders who are willing to acknowledge their crime and assume responsibility for their conduct.[137] Responding favorably to an individual's sincere expression of remorse is reasonably and necessarily related to the governmental goal of promoting rehabilitation. Other such purposes, previously discussed, include the facilitation of plea negotiations in homicide cases, necessary to achieve flexibility and efficiency as well as justice in criminal justice administration; the conservation of scarce judicial and prosecutorial resources for those cases which properly require trial; and the prompter imposition of punishment on acknowledged offenders.[138]

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[137] *State* v. *Poteet*, 61 N. J. 493, 496, 295 A.2d 857, 859 (1972); *State* v. *Forcella*, *supra*, 52 N. J. at 275, 299-300, 245 A.2d at 189.

[138] See *Brady* v. *United States*, *supra*, 397 U.S. at 752.

By the same token, it is apparent that a mandatory life term for first degree murder is reasonably related to the goal of deterence. Mandatory penalties are within the power of the legislature to prescribe and the judiciary seldom acts to challenge their validity.[139] In this context, the statutory penalty challenged here serves as a warning to those who might be predisposed to commit the criminal offense that they will be harshly dealt with upon conviction. The penalty is applicable to a class of offenders whose disregard for life justifies severe punishment.

In any event, it is clear that the penalty is supported by a compelling governmental interest. It is incumbent upon the State to protect its citizens against premeditated and deliberate attacks. In sum, the statutory penalty serves a compelling governmental interest in deterring criminal conduct. The judiciary cannot and should not substitute its judgment for that of the Legislature.

Since the penalty provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 are reasonably and necessarily related to proper governmental objectives and serve compelling state interests, we respectfully submit that the guarantee of equal protection is not denied by the sentencing scheme of the statutes.

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[139] See *State* v. *Howland*, 103 Ariz. 250, 439 P.2d 821 (1968); *McDonald* v. *State*, 501 F.2d 385 (9 Cir. 1974), *cert. den.* 419 U.S. 1004 (1974); *State* v. *Colcord*, 170 Minn. 502, 212 N.W. 894 (1927).



## CONCLUSION

**Wherefore, the Appellee respectfully submits that the decision of the Supreme Court of New Jersey be affirmed.**

Respectfully submitted,

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